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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 724

CLYDE H. WALKER, *Petitioner,*

v.

P. J. SQUIER, WARDEN, UNITED STATES PENITENTIARY, McNeil Island, Washington, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

S. WALLACE DEMPSEY,
Counsel for Petitioner,
723 Investment Building,
Washington, D. C.

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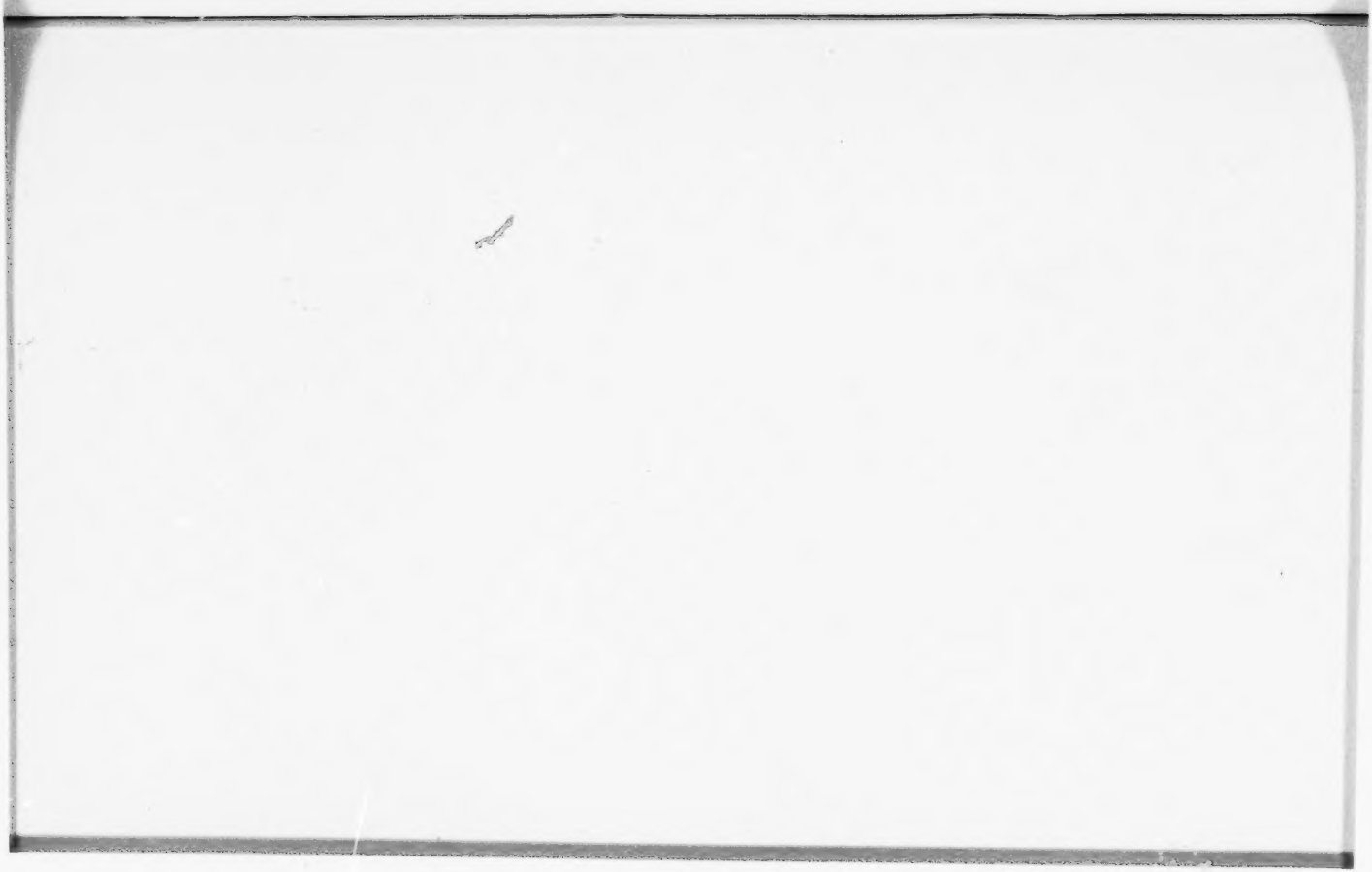

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IN THE

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No. ——

CLYDE H. WALKER, *Petitioner,*

v.

P. J. SQUIER, WARDEN, UNITED STATES PENITENTIARY, McNeil Island, Washington, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

The petitioner, Clyde H. Walker, prays that a writ of certiorari be granted to review an order, made November 24, 1943, to the United States Circuit Court of Appeals for the Ninth Circuit, dismissing the petition for and refusing to grant a writ of habeas corpus to your petitioner. The proceeding was instituted by Appellant Clyde H. Walker who, when he filed his petition for the writ, was a citizen and in custody of P. J. Squier, Warden of the United States Penitentiary at McNeil Island, Pierce County, Washington (hereinafter called the Warden).

Petitioner and another were convicted in the District Court of the United States for the western district of Washington, Southern Division, under an indictment for violation of Section 338, Title 18, U. S. C. A., for using the mails to defraud, and under a second indictment for violation of Section 88 of the same Title, for conspiracy to violate said Section 338. Judgments were entered on such convictions on March 4, 1939 and the term of the sentence thereunder expires in 1947. Petitioner, meanwhile, has been and now is under custody of said Warden, pursuant to said sentence.

The petition for habeas corpus was filed December 24, 1942 pursuant to Sections 451 to 466, incl., of Title 28, U. S. C. A., by which district courts are given jurisdiction to issue the writ and inquire into the cause of restraint of liberty.

The Petition (Tr. 2), Answer of Respondent (Tr. 16), and Traverse (Tr. 19) raise issues of fact under the contention of appellant that he was effectively denied a fair and impartial trial, as guaranteed by the statutes of the United States and the 6th Amendment to the Constitution of the United States, and was further denied his rights of due process, as accorded him by the 5th Amendment of said Constitution, and that by its failure to observe these constitutional and statutory safeguards, the District Court, in the trial of said cause, lost jurisdiction in the premises, the trial of appellant was rendered illegal and void, and that petitioner is entitled to discharge from the effect of said void judgment of conviction, and the sentence imposed thereunder.

The District Court issued its Order in this proceeding requiring the Warden to show cause, on the 22nd of January, 1943, why the prayer of the petition should not be granted. (Tr. 15.) After hearing on this Order, the District Court entered an Order on February 13th, 1943, dismissing the petition for the writ of habeas corpus. (Tr. 32.) By its order of February 26th, 1943, the District Court

authorized appellant to prosecute his appeal in forma pauperis, and certified that there was probable cause and merit in the appeal, and that the appeal was being undertaken in good faith. (Tr. 33.) Notice of appeal was duly served and filed. (Tr. 60.)

On May 8th, 1943, appellant filed in the District Court, his designation of contents of record on appeal (Tr. 61-65), and on the same date filed in the District Court his statement of points on appeal. (Tr. 64-65.) On June 12th, 1943, the Clerk of said U. S. District Court forwarded to the Clerk of said Circuit Court of Appeals transcript of record on appeal which was filed on June 14, 1943; that upon filing the record in said Circuit Court of Appeals, petitioner filed with the Clerk of said Court, a concise statement of the points on which he relied and a designation of the parts of the record which he thought necessary for the consideration thereof. (Tr. 70-78.)

Petitioner had no attorney or counsel in the trial of this case, but himself, without assistance, conducted his own defense.

STATEMENT OF THE CASE.

Petitioner is confined in the Federal Penintentiary at McNeil Island, Pierce County, Washington, pursuant to judgment and sentence imposed upon him by said District Court. His case was appealed to said Circuit Court of Appeals and the opinion affirming the District Court order appears in Volume 139 F. (2d) 28.

The petition for a writ of habeas corpus was filed December 24, 1942. Shortly before that, petitioner learned that the United States, in the prosecution of this case against him, had paid substantial sums of money as so-called expert witness fees to three (3) individuals, to wit, Raymond P. Tarr, Thomas F. Downing, Jr., and George E. Evans, who testified against him and in behalf of the United States at the trial. (Tr. 5-10, incl.)

There was no order of the Court authorizing the hiring of expert witnesses and no entry on the Court Docket that such an order was ever made. No one of these three witnesses was qualified on his examination as an expert; it did not appear from their examination that they testified as experts; and petitioner was ignorant of any claim by the Government that they were experts and testified as such until he learned, on or about August 20, 1942 (Tr. 5, 6), by letter from the U. S. Marshal for said District, that these three witnesses had been paid so-called, or alleged, expert witness fees; and petitioner was ignorant of any claim that these witnesses testified as experts or were paid such fees until said date.

Raymond P. Tarr, one of the alleged experts, previous to testifying, had tried to obtain employment with the United Collieries Company at the mine involved here after petitioner and another were indicted and prior to the trial, and because he was unable to secure such employment, and to secure expert fees he testified falsely against petitioner. (Tr. 8-9.) When Tarr asked for a job in 1937 he told the Company that the property in question here was valuable (Tr. 55), and then testified in 1939 that there was no coal there, that the property was worthless. (Tr. 55-56.) Petitioner did not learn these facts until after his conviction, after the time to appeal had expired. He offered and requested to be allowed to prove these facts and the bias of the witness (Tr. 55-56), but the Court limited the evidence as to the so-called expert witnesses to bribery, thus excluding the evidence that they were not qualified, and did not testify, as experts and were not, for that reason alone, entitled to be paid as such, and also excluded all evidence to show that the witness Tarr was biased and prejudiced against petitioner. (Tr. 49 to 57, incl.)

Said Circuit Court of Appeals affirmed the Order of the District Court (139 F. (2d) 28), on the single ground that the payment of what the Government claimed were expert fees did not constitute bribery, or so prejudice petitioner's

trial as to violate his guarantee of a fair trial and deprive him of his liberty without "due process of law." The Court did not consider the exclusion by the District Court of the evidence offered by petitioner to prove that the so-called expert witnesses were not qualified as such, and did not so testify; that no order was made for their payment; and that the petitioner did not learn of any claim that they were experts or that they were paid fees as such, until long after his conviction and until after his time to appeal had expired; nor did the said Circuit Court of Appeals consider the petitioner's offer to prove that the witness Tarr was prejudiced or biased.

In May 1943, petitioner had obtained the funds with which to prosecute this proceeding at his own expense, whereupon he ordered from the official court reporter of the trial, the testimony of the two witnesses, Evans and Downing, and received in reply a letter, dated May 5, 1943, from said official court reporter, stating that,—

> "* * * early this year I destroyed all notes which I took in the Walker-Sheehy trials in Federal Court. This would preclude my being able to furnish a transcript of the testimony of the witnesses Evans and Downing."

as appears from an annexed copy of said letter to Miss Dorothy Shallow through whom petitioner gave the order.

There was struck off heretofore an incomplete transcript of evidence of these trials, but it is incomplete, which was the reason for ordering the transcript in May 1943 for use in preparing the brief and arguing the appeal in the Circuit Court of Appeals, the hearing and argument being had on October 21, 1943.

SPECIFICATION OF ERRORS TO BE URGED.

1. The courts below erred in refusing to hold that the payment of alleged expert's fees was a violation of the Statute, Sec. 601 of Title 28, U. S. C. A., also Department of Justice Appropriations Act of April 27, 1938, Ch. 180,

52 Stat. 268, and of the statutory procedure provided thereby for the protection of defendants in criminal prosecutions, including your petitioner, and that petitioner was thereby denied a fair and impartial trial and that such payment was a violation of his constitutional rights secured to him by the Constitution of the United States and the Sixth Amendment thereto.

2. That the District Court erred in excluding all testimony as to bias or prejudice of the so-called expert witness Tarr, and in limiting the proof as to the character and attitude of said witness as to corruption and bribery of him, which proof, so excluded, would have shown that petitioner was denied a fair and impartial trial as guaranteed by the Constitution of the United States and the Sixth Amendment thereto.

3. That the District Court erred in excluding evidence that (although paid fees as expert witnesses), the three witnesses, Raymond P. Tarr, Thomas F. Downing, Jr., and George E. Evans, were not qualified as experts and did not testify as such and the payment of so-called expert fees to them violated said Statutes fixing the fees of witnesses and the procedure in that respect, and your petitioner was thereby denied a fair and impartial trial as guaranteed him by said Statutes and by the Constitution of the United States and the Sixth Amendment thereto.

4. The destruction of the minutes of your petitioner's trial by the Government through its "official court reporter," leaving only a partial transcript of the minutes of trial, has made it impossible for petitioner to show fully that said so-called expert witnesses were biased and prejudiced and has made it impossible for petitioner to show fully and accurately that he was, through the testimony of said witnesses and through the evidence as a whole, denied a fair and impartial trial as guaranteed by United States Statutes and the Constitution and the Sixth Amendment thereto.

REASONS FOR GRANTING THE WRIT.

Through the errors specified above, petitioner was denied a fair and impartial trial as guaranteed to him by the Constitution, and the errors arose too late to be available on appeal and this proceeding by habeas corpus is the sole means available to him to secure relief from the unjust and void judgment and sentence under which he is restrained of his liberty.

For the reasons stated, it is respectfully submitted that the petition for a Writ of Certiorari should be granted.

S. WALLACE DEMPSEY,
Attorney for Petitioner,
723 Investment Building,
Washington, D. C.

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BRIEF IN SUPPORT OF PETITION.

OPINION BELOW.

The opinion of the Circuit Court of Appeals is reported in 139 F. (2d) 28.

JURISDICTION.

The jurisdiction of this Court is invoked by reason of the errors specified in the Specification of Errors hereinabove set out and pursuant to Secs. 451-466, incl., Title 28, U. S. C. A.

QUESTIONS PRESENTED, SPECIFICATION OF ERRORS TO BE URGED AND STATEMENT OF THE CASE.

A statement of the questions presented, specifications of errors to be urged, and statement of the case will be found in the foregoing petition.

Argument.

Preliminary—

The two following general rules are important in considering the specific errors on which the petitioner relies, viz—

(a) "* * * where he," (the accused), "is conducting his own defense, the record must be closely scrutinized to see that his rights in endeavoring to maintain his innocence, have been protected." (17 C. J. §3541, p. 202.)

(b) "It was the duty of the District Attorney to select able and unprejudiced experts who would testify without partiality or bias against the defendants, * * *." (Commonwealth v. Sacco, 255 Mass. 369, 151 N. E. 830; See also Brower v. State, 221 P. 1050, 24 Okla. Crim. 49: 23 C. J. S. §1081, p. 519.)

"He," (District Attorney), "may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (Berger v. U. S., 295 U. S. 86, 88, 79 L. Ed. 1321.)

I.

The refusal of the Courts below to hold that payment of alleged expert's fees violated the two Statutes above described, and the statutory procedure provided thereby, and resulted in denying petitioner a fair and impartial trial and violated his constitutional rights.

(a) The trial involved here took place between October 1938 and February 1939, and §601 of Title 28, U. S. C. A., was in force during that time and until December 24, 1942, and provided that—

> "'Witness shall be paid for each day's attendance in Court, * * *, $1.50 and 5 cents a mile for going from the place of residence to place of hearing, and 5 cents a mile for return.''

(b) The Department of Justice Appropriation Act, 1939, Act April 27, 1938, c. 180, 52 Stat. 268, making an appropriation for the payment of witness fees, contains a proviso—

> "'* * * that no part of the sum herein appropriated shall be used to pay any witness more than one attendance fee for any one calendar day, which fee shall not exceed $1.50,''

being for the fiscal year from July 1, 1938 to July 1, 1939, and for the period covered by the trial herein. (See *Henkel* v. *Chicago, St. Paul, M. & O. Ry. Co.*, 284 U. S. 444, 447.)

(c) "Apart from Statute it may be laid down as a general rule that an expert witness may be compelled to testify as to matters of professional opinion, or matters of which he has gained a special knowledge by reason of his professional training or experience, without any compensation other than the fee of an ordinary witness.'' (Bradley v. Davidson, 47 App. D. C. 285; see also Dickson v. People, 168 Ill. 179, 39 L. R. A. 116, 48 N. E. 108; and Stevens v. Worcester, 196 Mass. 45, 56, 81 N. E. 907 and 40 Cyc. 2187, all three cited in Bradley v. Davidson, supra.) See also Henkel v. Chicago, St. Paul, M. & O. Ry. Co., supra.

(d) The violation of said §601 and of said Appropriation Act by paying more than these Statutes permitted, was a violation of procedure in the trial, which deprived petitioner of his constitutional rights requiring that the judgment of conviction be reversed.

Here, there was a violation not only of the general rule as laid down in said §601, but of the prohibition in the Act appropriating monies for the period when the trial took place. Not only do the cases, as appears from the citations above, hold that no expert fees could be paid, but there could be no claim of inadvertence or oversight by Congress,—an examination of the index of the Statutes (U. S. Code, 1940 Ed.), under the title "Witnesses" shows by a multitude of instances that Congress has been most particular in passing Statutes as to attendance of witnesses and payment of their fees.

Walker v. *Johnson*, 312 U. S. 275, holds that a violation of the procedure fixed by Statute requires reversal of a criminal conviction.

> "The bars which guard the right to a fair trial, such as is guaranteed by our Constitution, include court procedure, rules of evidence and proper instructions to the jury. These bars must not be lowered. To do so is to strike at the very foundation of our system of jurisprudence which has for its ultimate goal the preservation and protection of the liberty and freedom of the individual citizen." (Miller v. U. S., 120 F. (2d) 968, 969, 973.)

In *Weiss* v. *U. S.*, 308 U. S. 321, the government offered in evidence phonograph records and typewritten transcripts of telephone messages to and from the accused, obtained by tapping his lines. The authenticity of the messages was proved by certain defendants turning State's evidence and being paid considerable amounts previous to the trial. The court held,—

> "It is not too much to assume the interdiction of the Statute was intended to prevent such a method of procuring testimony,"

thus condemning, not alone the tapping of the wires, but the large payments made, as here, to witnesses, who, in the case cited had turned State's evidence. This Weiss case condemns specifically such unauthorized payments of witnesses as were made in this case.

(e) The trial court and the Circuit Court of Appeals both mistakenly held that petitioner's contention that the payments made to the so-called experts was bribery depended on inference alone, whereas the witnesses were entitled only to $1.50 a day and the payment of the excess was of amounts to which they were not entitled and to induce them to testify, as, without such payment, it was their legal duty to do, and the making and accepting of such payments in excess of the amounts permitted by the Statutes constituted bribery.

> "'Bribery' under the common law is the giving or receiving of anything of value or any valuable service, intended to influence one in the discharge of a legal duty; gist of the offense being tendency to pervert justice." (People v. Peters, 106 N. E. 513, 515, 265 Ill. 122, Anno. Cas. 1916-A 813.)
>
> "To constitute the offense of bribing a witness to avoid process there must have been a process either issued or served." (Harrison v. State, Tex., 151 S. W. 552, 553.)
>
> See also, People v. Van DeCarr, 84 N. Y. S. 461, 463, 87 App. Div. 386; Commonwealth v. Bell, 22 A. 641, 644, 145 Pa. 374; Commonwealth v. Benedict, 173 A. 850, 114 Pa. Sup. 183; Walsh v. People, 65 Ill. 58, 65, 16 Am. Rep. 569.
>
> "Bribery may be defined to be the giving (and perhaps offering) to another anything of value, or any valuable services intending to influence him in the discharge of some legal duty." (Dishon v. Smith, 10 Iowa 212, 221; 1 Words & Phrases, p. 868.)

Petitioner had no knowledge that the witnesses were experts or that they were qualified as such, and nothing was

said in court to that effect. This was emphasized by petitioner asking witness Tarr what he was and he answered that he was getting $25.00 a day while at the property, whereas he was paid expert's fees for eight days, ($200.00), (Tr. 6), although he testified only on two days (Tr. 7 & 45). Moreover, Tarr went to the mine but once and that was during the first trial, and so was paid for five days at the property in June and July, and was paid solely for attendance at this, the second trial (Tr. 6). So, his answer was contrary to the facts and clearly intended to be so, both in the circumstance that he was not paid at the second trial for being at the property and that he was paid on the second trial for testifying and only for testifying. Downing was paid for ten (10) days as a witness, ($250.00), (Tr. 6), besides $262.25 as travel fees. Downing testified one day only (Tr. 27), but was paid witness fees at $25.00 per day for ten days. Evans testified one day and was paid for 2 days at $25.00 per day ($50.00), (Tr. 6, 27). (Id), a clear violation of the Appropriations Act passed April 27, 1938, which provides,—

> "* * * that no part of the sum herein appropriated shall be used to pay any witness more than one attendance fee for any one calendar day, which fee shall not exceed $1.50, * * *."

II.

That the District Court erred in excluding testimony as to bias or prejudice of the so-called expert witness Tarr, and in limiting the proofs to corruption and bribery of him, which proof, so excluded, would have shown that petitioner was denied a fair and impartial trial.

(a) Evidence as to bias or prejudice was excluded and the proof limited to corruption and bribery. Petitioner alleged in his petition that the witness Tarr sought employment of the owners of the mines, for selling stock in which petitioner was indicted, and because he was refused

such employment and for the payment the government made him, testified corruptly. (Tr. 8). Petitioner asked to prove that Tarr went to the owners of the mine in 1937 and asked for a job, and told the owners that the property was valuable, and then in 1939 testified that there was no coal there and the property was worthless. The court limited the testimony to bribery. (Tr. 55-56.)

(b) The exclusion of this evidence was highly prejudicial error. The facts that petitioner offered to prove were known to him only shortly before the argument in this proceeding in the trial court. It was the duty of the District Attorney to swear only unbiased and fair witnesses and his violation of this duty resulted in petitioner's being denied a fair and impartial trial,—

> "It was the duty of the District Attorney to select able and unprejudiced experts who would testify without partiality or bias against the defendants," Attorney-General, petitioner; 104 Mass. 537, 544. "And if, through the purposed conduct of the representatives of the Commonwealth, prejudice was deliberately created, the question would be presented whether justice had been done, and if not done, whether a new trial, at least as to the defendant Sacco, should be ordered." (Commonwealth v. Sacco, 151 N. E. 830; 255 Mass. 369.)
>
> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." (Lisenba v. Calif., 314 U. S. 236, 237, 86 L. Ed. 180.)
>
> "* * * in Martin v. United States (1927; C. C. A. 5th) 17 F. (2d) 973, * * * the court said: 'There is no way for a court to determine that the perjured testimony did not have controlling weight with the jury, and, notwithstanding the perjured testimony was contradicted at the trial, a new light is thrown on it by the admission that it was false; so that, on a new trial, there would be a strong circumstance in favor of the losing party that did not exist, and therefore could not have been shown at the time of the original trial', * * *."

The Court in *Larrison* v. *U. S.*, 24 F. (2d) 82, laid down as requiring a new trial, the following tests,—

1. That "the court is reasonably well satisfied that the testimony given by a material witness is false," and here the petitioner offered to prove that the testimony of the witness Tarr was false;

2. that "without it, the jury might have reached a different conclusion," and here the false testimony was on the one issue involving guilt or innocence,—whether the mine was worthless or valuable;

3. that "the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it, or did not know of its falsity until after the trial," which was the case here;

4. The trial court should have heard the evidence which was excluded,—

   "* * * Not by the pleadings and the affidavits, but by the whole of the testimony, must it be determined whether the petitioner has carried his burden of proof and shown his right to a discharge. The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record it is his right to be heard." (Walker v. Johnson, 312 U. S. 286, 85 L. Ed. 836.)

   "Evidence by other than person charged with bias is proper and exclusion of such testimony to show such bias is error." (Davis v. Ivey, Fla., 112 So. 264.)

III.

The District Court erred in excluding evidence that (although paid fees as expert witnesses), the three witnesses, Raymond P. Tarr, Thomas F. Downing, Jr., and George E. Evans, were not qualified as experts and did not testify as such, as in such case the payment of so-called expert's fees to witnesses not experts violated said Statute fixing the fees of witnesses and the established procedure in that respect, and the petitioner was thereby denied a fair and impartial trial.

(a) The fact that the witnesses, Tarr, Downing and Evans, did not qualify as experts or testify as such was raised by the petition (Tr. 7); and it was alleged that payment of expert's fees to the witnesses Tarr, Downing and Evans was to induce them to testify falsely that coal does not exist in commercial quantity in the mine involved here. (Tr. 7, 9.)

The Government answer alleged that the so-called experts were called as such and received compensation as experts (Tr. 18), but fails to allege that they were qualified or testified as such. All that could be claimed in this respect is that the government denies all allegations not specifically denied, but this could not in fairness be claimed to embrace the statement lacking as to qualifications and swearing, since the allegations of what the government deemed material as to these witnesses was specifically denied.

Then, on the hearing petitioner stated that he did not know that these witnesses were experts (Tr. 43, 45), and that when he asked Tarr what he was, the witness answered that he was getting $25.00 a day while at the property, thus concealing the payment to him while on the stand. (Tr. 45.)

The court, who did not preside at the trial and who stated that he did not read the transcript (Tr. 40), ruled that the transcript showed that the witnesses expressed opinions, (when in fact, the testimony of none of the three witnesses,

Tarr, Downing or Evans, was ever transcribed), and that petitioner should have discovered by cross-examination that these witnesses were experts, that he was bound to know it and, though not in words, in effect and in fact excluded the testimony.

(b) The court erred in ruling as it did that petitioner must have known and was bound to learn by cross-examination that the witnesses in question were experts.

> "Not by the pleadings and the affidavits, but by the whole of the testimony, must it be determined whether the petitioner has carried his burden of proof and shown his right to a discharge. The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record it is his right to be heard." (Walker v. Johnson, 312 U. S. 286, 85 L. Ed. 836.)

(c) As the testimony of the witnesses Tarr, Downing and Evans was never transcribed and has now been destroyed, the indisputable inference is, as petitioner claimed on the hearing, that no one of these witnesses was qualified or sworn as an expert (see authorities under Specification 4 hereinbelow).

(d) The exclusion of the evidence that these witnesses were not qualified or sworn as experts, was and is of the highest materiality:—it makes glaringly plain that, not being experts, they were not entitled (aside from the statutory prohibition), to be paid as such.

IV.

The destruction of the trial minutes by the Government through its "official court reporter," leaving only a transcript of the testimony of some of the government witnesses, has made it impossible for petitioner to show that the so-called expert witnesses were biased and prejudiced against him and that, through their testimony, and on the case as a whole, petitioner was denied a fair and impartial trial as guaranteed him by the Constitution of the United States and the Sixth Amendment thereto.

(a) The destruction of the minutes was the act of the government. It will be seen from the letter-head of the letter, that Russell N. Anderson, the writer of the letter, shows that he is and was the

"Official Court Reporter"

with an office at "313 Courthouse."

(b) The action of the "official court roporter" was the action of the government.

> "And the action of prosecuting officers on behalf of the State, like that of administrative officers in the execution of its law, may constitute State action within the purview of the Fourteenth Amendment. That Amendment governs any action of a State, 'whether through its legislature, through its courts, or through its executive or administrative officers.' Carter v. Texas, 177 U. S. 442, 447, 44 L. Ed. 839, 841, 20 S. Ct. 687; Rogers v. Alabama, 192 U. S. 226, 231, 48 L. Ed. 417, 419, 24 S. Ct. 257; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 233, 234, 41 L. Ed. 979, 983, 984, 17 S. Ct. 581." (Mooney v. Holohan, 294 U. S. 112, 113, 79 L. Ed. 794.)

(c) The circumstances under which, and the time when, the minutes were destroyed leads inevitably to the inference that the Government intended thereby to cripple the petitioner in his efforts to set aside what he contends was

a conviction by unfair and illegal means, and to make it impossible for him to produce the evidence to prove this.

The hearing on habeas corpus in the trial court was on January 22, 1943. The argument in the Circuit Court of Appeals was heard October 21, 1943. In May 1943 petitioner had obtained funds with which to prosecute this proceeding at his own expense, and for use in the Circuit Court of Appeals he ordered the minutes. They had been preserved from the conclusion of the trial in February 1939 for over four years,—what possible excuse could there be for destroying them while petitioner's rights were not only undetermined, but being prosecuted, and when the appeal before the Circuit Court of Appeals was about to be heard? The effect on petitioner of the destruction of the minutes was disastrous regardless of what the motives for such action may have been.

(d) The petitioner is entitled to have this letter received and considered because the destruction of the minutes was first called to his attention by it after the hearing in the trial court, and because it is a certificate of the government, the disastrous effect of which on petitioner cannot be changed by any possible explanation as to motives.

The case is similar to *Waley* v. *Johnston*, 316 U. S. 101, in that there, as here—

> "* * * a conviction had been in disregard of the constitutional rights of the accused, and where a writ is the only effective means of preserving his rights," and the "* * * facts relied on are dehors the record, * * *."

The case is similar also to *Kendall* v. *Ewart*, 259 U. S. 139, in that in the case cited, as in that at bar, the proof dehors the record was admitted because it was furnished by appellee as it is here by the government.

As early as *Seavey* v. *Seymour*, 21 Fed. Cas. 947, 953, Judge Clifford laid down the rule that an appellate court would receive competent evidence which was offered and excluded in the trial court, because the party offering it on

appeal was unable to produce it below. The principle is the same here:—petitioner was unable to produce in the trial court evidence that the minutes had been destroyed, as the destruction occurred subsequent to the hearing.

In *McKnight* v. *Washington Nat. Ins. Co.*, 131 S. W. (2d) 1072 (Tex. Civ. App.), counsel for appellants stated that no evidence was heard by the trial court in ruling on issues of fact presented by appellee's plea in abatement and the appellate court had held that as a matter of law the plea was well taken and the statements were neither denied by appellee nor in conflict with the record, and the court accepted the statements as true. So, here the Government has stated that it destroyed the minutes which is not denied by petitioner nor is it in conflict with the record, and the statement should be accepted as true. (See also 9 Amer. & Eng. Anno. Cas. 949, 953.)

(e) The destruction by the Government of the minutes of trial leaves the government with no evidence to sustain the judgment and sentence and raises a conclusive presumption that there was no evidence sufficient to justify them,—that petitioner was innocent. The cases hold that the destruction of evidence by a party leaves the spoliator with no evidence to sustain his contention and no right to offer secondary evidence, and that a conclusive presumption arises that the evidence would prove the adversary's claim. Such cases have arisen largely in civil controversies, but the rule laid down should apply more strongly in favor of an accused and particularly one who was obliged to defend as a pauper and be his own attorney.

In the following cases it was held that where a party destroys evidence a conclusive presumption arises contrary to the position taken by him and in favor of the opposing party, which cannot be rebutted by secondary evidence, viz.—

> "Where part of material instrument is destroyed, presumption is that it was against interest of spoliator;

but where the entire instrument is willfully destroyed, presumption is conclusive that instrument would prove adversary's claim.—Middleton v. Middleton, 68 S. W. (2d) 1003, 188 Ark. 1022."

"Generally, every presumption is against intentional despoiler of documentary evidence.—Tilton v. Iowa Oil Co., 33 P. (2d) 446, 139 Cal. App. 93."

"Presumption that check was indorsed, 'in full settlement' arose from payee's obliteration of indorsement.—Deuches v. Grand Rapids Brass Co., 215 N. W. 392, 240 Mich. 266."

"Absence of documentary evidence concerning property of deceased and evidence of extent of property of sons warranted presumption that documentary evidence destroyed would establish widow's demand in suit against sons to establish trust.—Gaugh v. Gaugh, 11 S. W. (2d) 729, 321 Mo. 414, followed in Seehorn v. Gaugh, 11 S. W. (2d) 750, 321 Mo. 456."

"Where a paper is proved to have been destroyed or suppressed, or there is a strong suspicion of its having been done, the presumption in odium spoliatoris applies in favor of the party who claims under such paper, though the contents are not proved.—Askew v. Odenheimer, Fed. Cas. No. 587 (Baldw. 380)."

"The destruction of evidence warrants inference that the destroyed evidence contained statements of fact contrary to the position taken by the person destroying the evidence.—State ex rel. Department of Agriculture v. McCarthy, 299 N. W. 58, 238 Wis. 258."

"The intentional destruction of a letter creates a presumption that its contents were detrimental, which cannot be rebutted by secondary evidence.—Russell v. Bush, 71 So. 397, 196 Ala. 309."

"Everything will be presumed against the despoiler, so that where father, after executing deeds to children and delivering them in escrow to bank official, secured envelope from another official and returned it torn open, and on his death it was discovered no deed to particular son was inclosed, it must be presumed against children standing in father's shoes that there

was originally in the envelope an absolute deed to the son.—Hudson v. Hudson, 122 N. E. 497, 287 Ill. 286."

"Willfully despoiling a document will justify a presumption of law against the despoiler that the contents of the document were not as stated by him, but were as stated by his adversary.—Hunt v. Sanders, 232 S. W. 456, 288 Mo. 337."

"In an action for an accounting by mother's administrator against daughter who had collected insurance and rents due the mother, in which the daughter claimed to have spent the money and as the mother's agent, the amount claimed by the administrator to have been collected will be presumed to be the true amount under the doctrine of in odium spoliatoris, where daughter destroyed the books of original entry showing amount collected by her.—Haid v. Prendiville, 238 S. W. 452, 292 Mo. 552."

CONCLUSION.

The two courts below mistakenly held that the statutory prohibition of payment of witnesses more than $1.50 per day for testifying should be ignored, and overlooked the well considered cases, which have long been recognized as controlling, construing the general statute as prohibiting payments in excess of the statutory amount; they mistakenly overruled petitioner's offer to prove that the so-called expert witnesses were not qualified or sworn as such, and that the witness Tarr was prejudiced and biased against petitioner; all of which facts became known to petitioner and arose too late for him to avail himself of them by appeal, leaving this proceeding as his sole remedy. And, while this proceeding was pending in the Circuit Court of Appeals, the Government destroyed the minutes of testimony, and as there is only a partial transcript of the testimony of some of the prosecution's witnesses and no transcript of the testimony of any of the three witnesses, Tarr, Downing and Evans, what is left is not alone partial, but one-sided and therefore not only useless but harmful,

and the same in effect as though there was no transcript, which, as the Government cannot supply what is lacking by secondary evidence, raises the conclusive presumption that petitioner is sustained in his contention that his conviction was not justified by the evidence, but that there should have been a verdict of "not guilty," despite which he has been compelled to remain in prison since March, 1939, nearly five years, under this invalid verdict and judgment.

For the reasons stated, it is respectfully submitted that this petition for writ of certiorari should be granted.

S. Wallace Dempsey,
Attorney for Petitioner,
723 Investment Building,
Washington, D. C.

Charles R. Pierce,
with Attorney on Brief.

RUSSELL N. ANDERSON
OFFICIAL COURT REPORTER
[illegible]
TACOMA, WASHINGTON

May 5, 1943.

Miss Dorothy Shallow,
C/o Tacoma Hotel,
TACOMA, Washington.

Dear Miss Shallow:

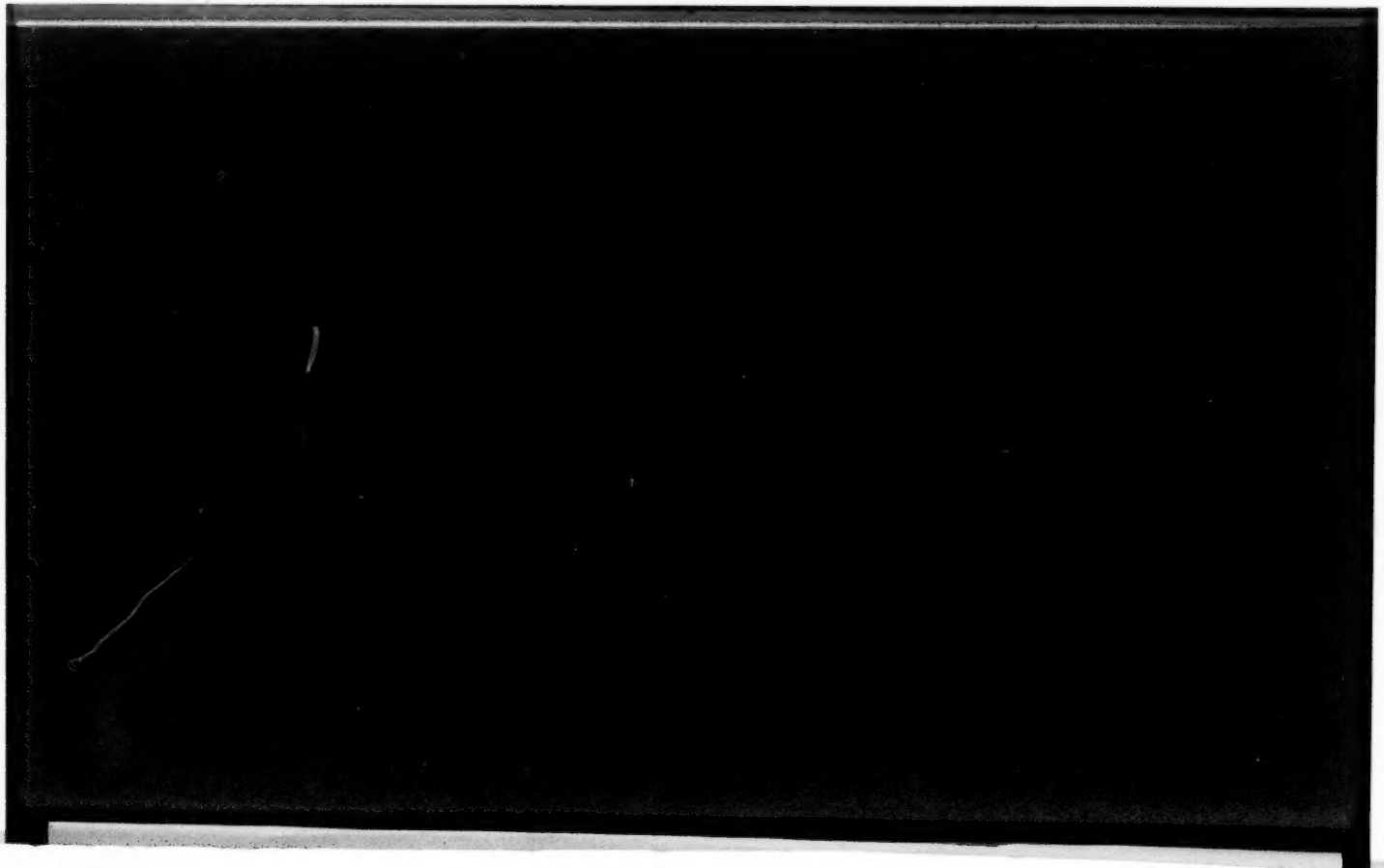
Confirming my statement to you this morning over the 'phone, please be advised that early this year I destroyed all notes which I took in the Walker-Sheehy trials in Federal Court. This would preclude my being able to furnish a transcript of the testimony of the witnesses Evans and Downing.

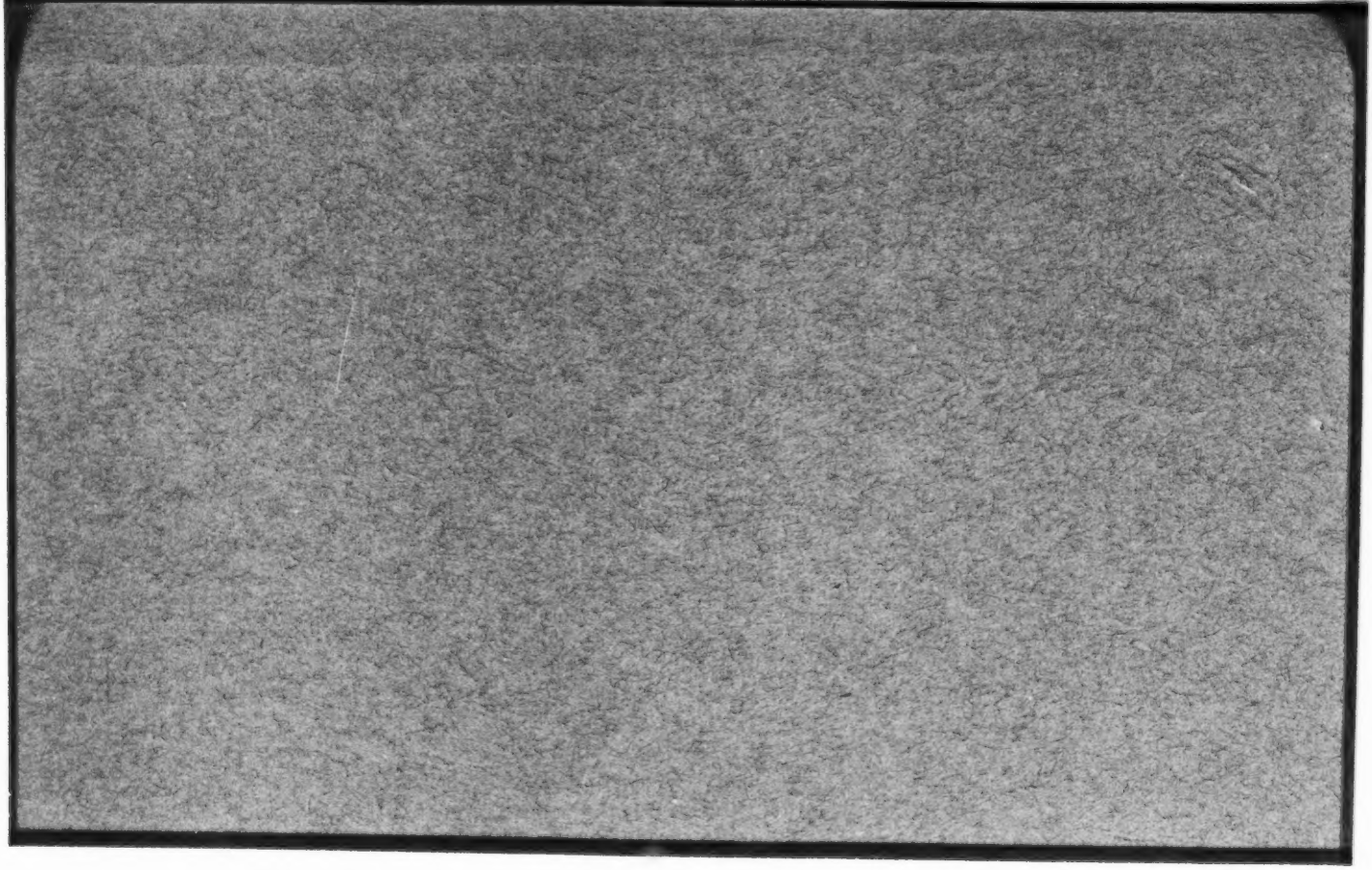
Regretting my inability to be of service, I am

Yours very truly,

Russell N. Anderson.

Russell N. Anderson.





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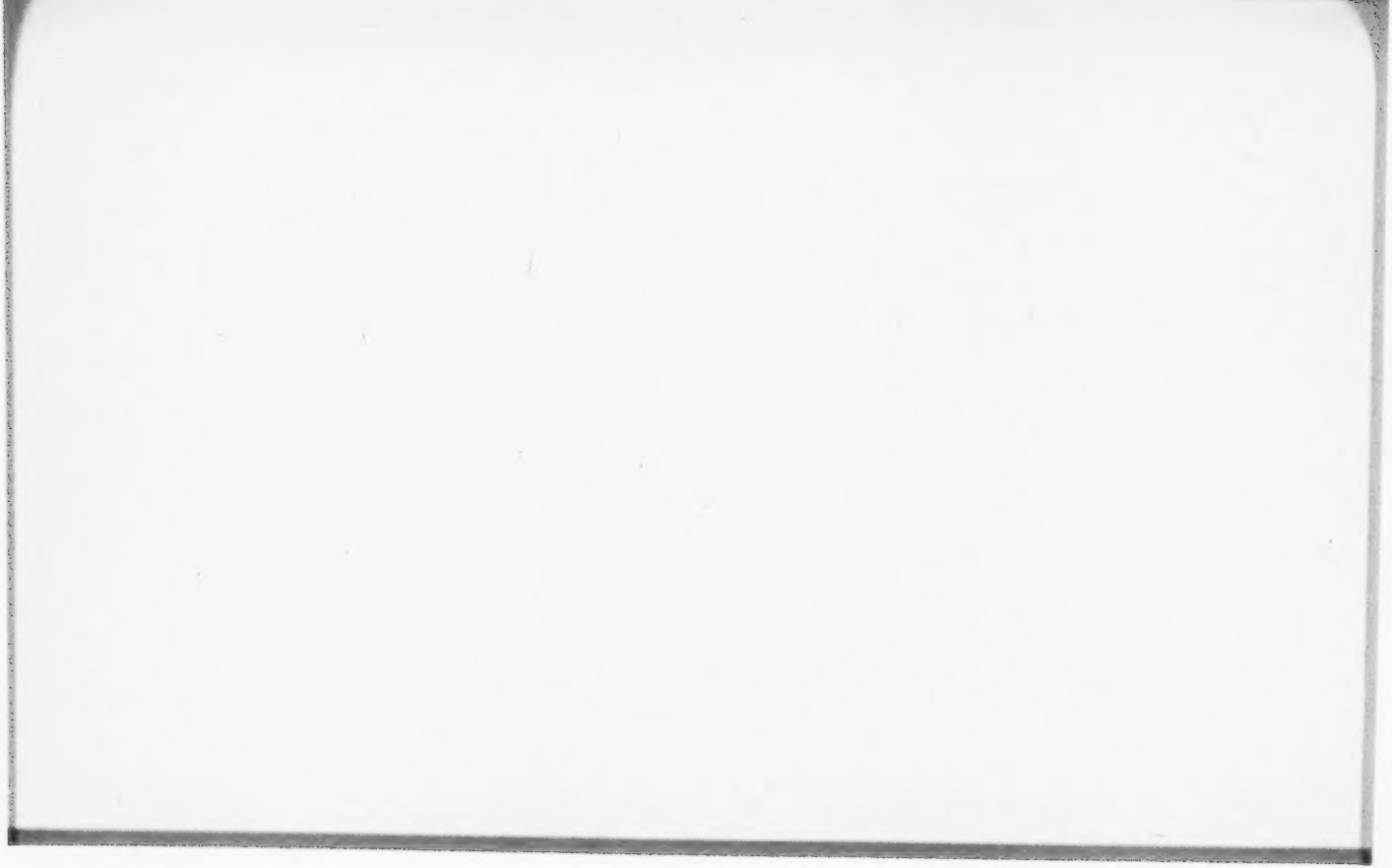

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 724

CLYDE A. WALKER, PETITIONER

v.

P. J. SQUIER, WARDEN, UNITED STATES PENITENTIARY, MCNEIL ISLAND, WASHINGTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 91–94) is reported at 139 F. (2d) 28. The district court's findings of fact and conclusions of law appear at pages 30–32 of the record.

JURISDICTION

The judgment of the circuit court of appeals was entered November 24, 1943 (R. 94). The petition for a writ of certiorari was filed February 23, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether payment by the Government of $25 a day to three witnesses who testified as experts at petitioner's trial voids petitioner's conviction and thus entitles him to release on habeas corpus.

STATEMENT

On March 4, 1939, petitioner was convicted in the United States District Court for the Western District of Washington under two indictments, one charging, in several counts, use of the mails in execution of a scheme to defraud, and the other a conspiracy so to use the mails (R. 4, 31). Petitioner, an attorney, represented himself at the trial (R. 41; see *Walker* v. *Chitty*, 112 F. (2d) 79, 81 (C. C. A. 9)). Petitioner was sentenced to a total of eight years' imprisonment (R. 5). On the day of his conviction, he filed a petition for a writ of habeas corpus in which he attacked the judgment of conviction on the ground that it resulted from an unfair trial. The petition was dismissed and the dismissal was affirmed by the Circuit Court of Appeals for the Ninth Circuit. *Walker* v. *Chitty*, 112 F. (2d) 79. Petitioner also took an appeal from the judgment of conviction and, on December 18, 1940, the judgment was affirmed by the same circuit court of appeals. *Walker* v. *United States*, 116 F. (2d) 458.[1]

On December 24, 1942, petitioner filed a petition for a writ of habeas corpus in the District Court

[1] See also *Walker* v. *United States*, 113 F. (2d) 314 (C. C. A. 9).

for the Western District of Washington in which he alleged, *inter alia,* that he was deprived at his trial of his constitutional rights by reason of the fact that the Government had paid to three witnesses who testified at his trial the sum of $25 per day as experts (R. 2–15). He alleged that such payments were unauthorized and amounted to bribery (R. 8–10); that he had first learned of such payments to one of these witnesses, Tarr, on cross-examination of Tarr at the trial (R. 7), but that he did not know at that time that the other two witnesses, Downing and Evans, were experts and did not know of the payments to them (R. 9–10). An order to show cause was issued on January 14, 1943 (R. 15–16). Respondent filed an answer to which petitioner filed a traverse (R. 16–21). A hearing was held at which petitioner appeared and testified (R. 30–31, 35). There was admitted into evidence a letter received by petitioner from the United States Marshal dated August 21, 1942, setting forth the total fees paid to the witnesses Tarr, Downing, and Evans and showing that they had received $25 per day for the days spent at the trial (R. 49–50). In the course of the hearing, petitioner stated that he was not aware at the time of his trial that these witnesses were experts, and the judge then remarked that petitioner, as a lawyer, must have known such fact from the nature of the testimony given by the witnesses (R. 45). The judge stated that he would hold that the payment of expert

witness fees was proper (R. 45). Later, when petitioner complained that the judge had restricted him in his testimony concerning the fees paid to the witnesses (R. 53), the judge stated that he did not intend to bar petitioner from offering evidence that "by reason of expert fees having been paid, witnesses were bribed and thus swore falsely" (R. 53–54). Petitioner then said that he had been told, but could not get proof, that in 1917 or 1920 the witness Downing had made a report about the coal property concerning which he had testified at petitioner's criminal trial in 1939, and that such report was directly contrary to Downing's testimony at the trial (R. 54–55). Petitioner admitted that at the trial he had cross-examined Downing about the report but stated that he did not have proof regarding the alleged report at that time (R. 54). Petitioner also asked the judge whether he would consider evidence that the witness Tarr had applied for a position at the United Collieries Corporation in 1937 and had said at that time that its property was valuable whereas in 1939 at the trial he testified that the same property was valueless (R. 55–56). Petitioner did not deny, however, that similar allegations had been included as part of his motion for a new trial after the judgment of conviction (R. 56). The judge stated that unless petitioner had direct evidence of bribery of the expert witnesses, he was inclined to believe that the mat-

ters brought out by petitioner at the hearing should have been and were covered at the time the witnesses testified at the trial (R. 56). Petitioner then declared that he was not obliged to offer any proof other than the fact that excessive fees had been paid to the witnesses (R. 56–57).

The district court held that it would be futile to issue a writ of habeas corpus since petitioner had already testified at the hearing on the answer to the order to show cause and no other evidence was suggested. It accordingly dismissed from the bench the application for a writ. (R. 58–59.) A petition for rehearing was filed February 1, 1943 (R. 21–24), and was denied February 11, 1943 (R. 25). On February 13, 1943, the court entered findings of fact and conclusions of law, holding that the compensation paid to the expert witnesses at petitioner's trial did not constitute bribery and was not such a matter as to affect the jurisdiction of the trial court (R. 30–32). The formal order of dismissal was entered February 13, 1943 (R. 32–33). On appeal to the circuit court of appeals the order of dismissal was affirmed (R. 94).

ARGUMENT

Petitioner contends (Pet. 5–6, 11–14) that the payment of $25 a day to expert witnesses was unauthorized and therefore constituted bribery. He relies upon that portion of the Department of Justice Appropriation Act, 1939 (Act of April 27,

1938, c. 180, 52 Stat. 268), which provided that no part of the moneys appropriated for witness fees should be used to pay any witness more than $1.50 for any one calendar day.[2] That very Act, however, appropriated an additional sum "for such miscellaneous expenses as may be authorized or approved by the Attorney General * * * including experts * * *" (52 Stat. 268). The fact that expert witness fees in excess of the statutory rate may not be charged as costs[3] does not establish impropriety in the payment of such fees. Fees for a stenographic transcript may not be taxed as costs,[4] but it is certainly not improper for the Government to pay for such services. The case of *Henkel* v. *Chicago, St. Paul, M. & O. Ry. Co.*, 284 U. S. 444, upon which petitioner relies (Pet. 11), recognizes that higher fees are customarily paid to expert witnesses and that in some states such fees are regulated by statute. The propriety of the practice of paying additional compensation to expert witnesses has been assumed in other cases in the federal

[2] Petitioner also cites as applicable (Pet. 11) 28 U. S. C. A. 601 (Rev. Stat., § 848), which fixed the rate of compensation of witnesses at $1.50 per day. However, the regular statutory rate in 1939 was $2.00 per day (28 U. S. C. (1934 ed.) 600c), but the 1939 Appropriation Act limited the Government to the rate of $1.50 per day.

[3] *Henkel* v. *Chicago, St. Paul, M. & O. Ry Co.*, 284 U. S. 444, 447.

[4] *Miller* v. *United States*, 317 U. S. 192, 197.

courts,[5] and experts have been hired at Government expense for an indigent defendant in a criminal case.[6]

Even if it were assumed that it was illegal to pay the experts who testified at petitioner's trial at rates in excess of the statutory rate, the district court and the circuit court of appeals were clearly correct in holding that the mere fact of such payment did not warrant an inference of bribery. In view of the prevalence of the practice of paying the expert witness a higher fee for his attendance in court, it cannot be said that the payment of such fees was a corrupt attempt to buy favorable testimony. Petitioner was under a duty to prove his allegation of bribery by a preponderance of evidence,[7] and this he wholly failed to do. At most the payment of excessive fees to the witnesses was an irregular expenditure of government funds which did not affect the jurisdiction of the convicting court. As the circuit court of appeals held (R. 93), the irregularity is less fundamental than other trial errors, such as the introduction of inadmissible evidence, which the courts have held

[5] E. g., see *Alexander* v. *Watson*, 128 F. (2d) 627, 630 (C. C. A. 4); *Cheatham Electric S. D. Co.* v. *Transport Development Co.*, 261 Fed. 792, 796 (C. C. A. 2); see Lobinger, *Compensation of Expert Witnesses*, 59 American Law Review 266 (1925).

[6] *United States* v. *Fox*, 19 F. Supp. 463 (S. D. N. Y.).

[7] *Walker* v. *Johnston*, 312 U. S. 275, 286; *Johnston* v. *Zerbst*, 304 U. S. 458, 468–469.

insufficient to warrant release on habeas corpus. *Matter of Moran,* 203 U. S. 96, 105; *Burrall* v. *Johnston,* 134 F. (2d) 614 (C. C. A. 9), certiorari denied, 319 U. S. 768; *Price* v. *Johnston,* 125 F. (2d) 806, 809–811 (C. C. A. 9), certiorari denied, 316 U. S. 677.

Contrary to petitioner's assertion (Pet. 6, 14–16), there was no exclusion of proof of bias and prejudice as to the witness Tarr at the hearing on his application for a writ of habeas corpus. As shown in the Statement (*supra,* pp. 4–5), petitioner merely asked the court whether it would consider, as evidence of the asserted bribery, proof that Tarr, in applying for employment, had made statements which petitioner said were inconsistent with Tarr's testimony at his trial. Petitioner made no offer to prove such allegation. When the district judge declared that he did not think that such evidence would affect his decision, particularly since this alleged ground of impeachment had been raised at petitioner's trial, petitioner was content to rest his case on the mere fact that the witness had been paid fees in excess of the statutory rate (*supra,* pp. 4–5). Moreover, it is clear that, assuming that petitioner had been able to prove that, as he claimed, the witness had made a prior inconsistent statement, such proof would not be sufficient to sustain petitioner's burden of proving by a preponderance of evidence that the

prosecuting officials had obtained his testimony by corrupt means. Cf. *Casebeer* v. *Hudspeth,* 121 F. (2d) 914, 915–916 (C. C. A. 10), certiorari denied, 316 U. S. 683.

There is no merit in petitioner's further contention (Pet. 17–18) that he was precluded at the hearing from proving that the expert witnesses did not testify as such. When petitioner stated that he did not know at the time of his trial that the witnesses were experts, the judge remarked that petitioner, as a lawyer, must have known that fact from the nature of their testimony, particularly since he was convicted after a second trial (R. 45). The judge was fully justified in reaching this conclusion on the basis of the reported decision on petitioner's appeal from his conviction (*Walker* v. *United States,* 116 F. (2d) 458), in which it appears that, after the trial had commenced, a juror asked to be excused on the ground that Tarr, a friend of his, "would be called in the nature of expert testimony on coal" (116 F. (2d) 461), and further that petitioner moved to strike out the testimony of Evans, Downing, Tarr, and others who testified as to the value of the United Collieries property (p. 463). Moreover, the alleged inconsistent statements by Downing and Tarr, which petitioner contended would support his charge of bribery (*supra,* p. 4), were statements as to the value of the property.

There is thus no question that petitioner knew at his trial that the witnesses were testifying as experts.[8]

CONCLUSION

The decision below is correct. It involves no conflict of decisions or question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.

TOM C. CLARK,
Assistant Attorney General.

ROBERT S. ERDAHL,
Special Assistant to the Attorney General.

BEATRICE ROSENBERG,
Attorney.

MARCH 1944.

---

[8] After the decision of the district court, petitioner apparently sought to obtain a transcript of the testimony of the witnesses Evans and Downing (Pet. 5, 19–23) but was informed by the stenographer that the minutes had been destroyed. The destruction of the minutes several years after petitioner's appeal had been determined carries, of course, no inference of an attempt to conceal evidence, as petitioner indicates. Furthermore, such action was not that of the Government since the stenographer was not an officer of the United States. *Miller* v. *United States*, 317 U. S. 192, 197.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 724.

CLYDE H. WALKER, *Petitioner,*

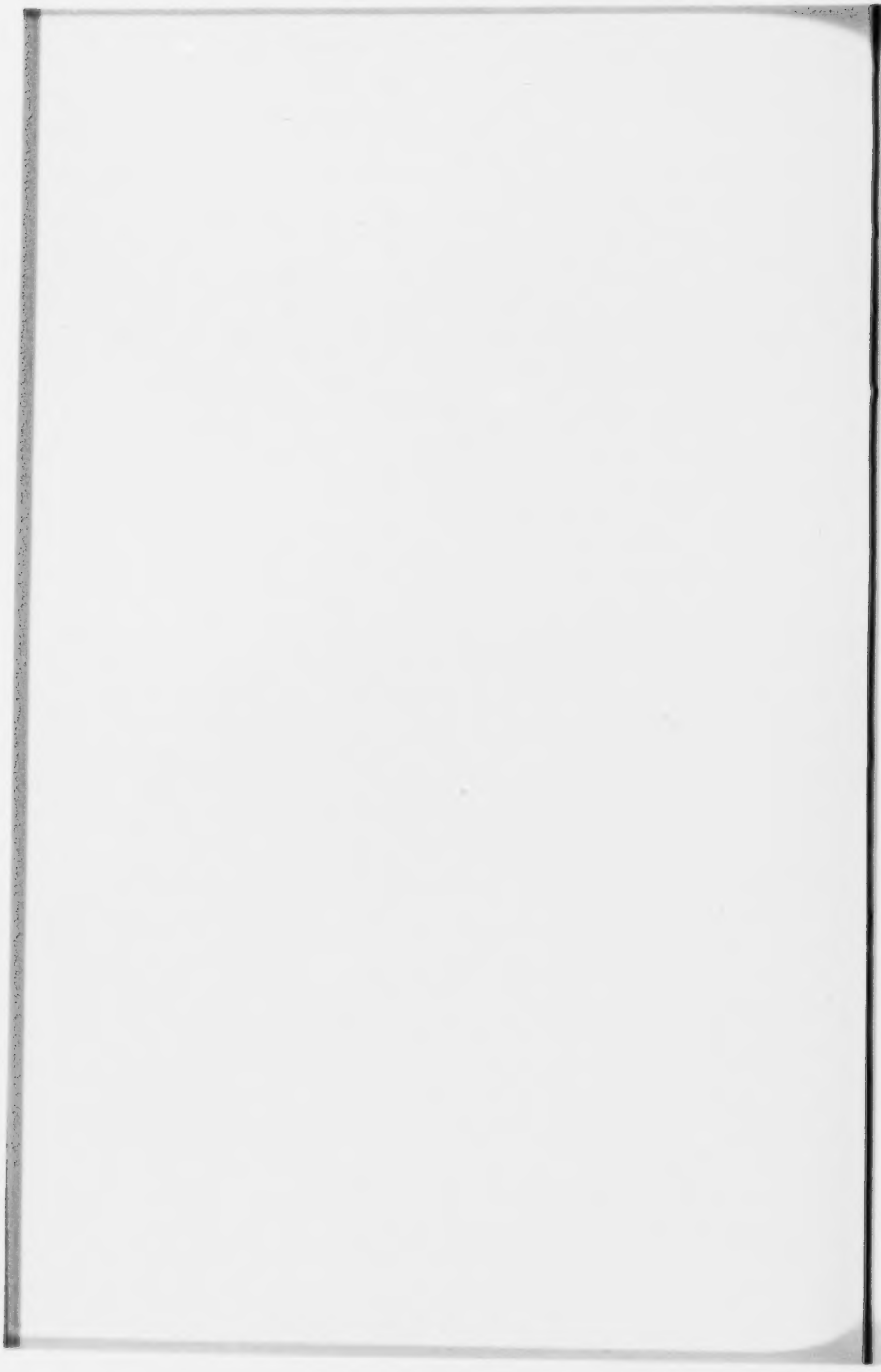
v.

P. J. SQUIER, Warden, United States Penitentiary, McNeil Island, Washington, *Respondent.*

REPLY BRIEF.

S. WALLACE DEMPSEY,
Counsel for Petitioner,
723 Investment Building,
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



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II. Petitioner asserted that the district court erred in excluding testimony as to bias of the witness Tarr. The Government mistakenly claims that such testimony was not excluded	3
III. Petitioner next claimed that excluding evidence that the witnesses Tarr, Evans and Downing were not qualified and did not testify as experts, was error, as payment of expert fees to them violated the statutes as to fees and the established procedure, and petitioner was thereby denied a fair trial	4
IV. Next, petitioner contended that the destruction of the trial minutes by the government's "Official Court Reporter" has made it impossible for petitioner to show that he was denied an impartial trial. The Government contends on an incomplete statement of the facts, that there is no inference of an attempt to conceal evidence and further mistakenly contends that the destruction was not that of one whose act was binding on the Government	5
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IN THE

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REPLY BRIEF.

Petitioner, for reply to the Government's answering brief, believes that it will be shown that the Government's extremely able and widely experienced attorneys, while saying all that possibly could be said in opposition to the petition, fail to answer any of the grounds on which petitioner has urged that he was, on the trial and on the hearing herein, denied due process and his constitutional rights. The inability of the learned, able and experienced government counsel to answer these grounds is most persuasive proof that they are valid and unanswerable.

PRELIMINARY.

The Government fails to refer to the two general rules stated under this heading in petitioner's brief, (and thereby concedes their force and applicability here),—

1. that, as petitioner conducted his own defense, "the record must be closely scrutinized to see that his rights * * * have been protected," (17 C. J. § 3541); and

2. that "it was the duty of the District Attorney to select able and unprejudiced experts who would testify without partiality or bias against the defendants * * *." (Commonwealth v. Sacco, 255 Mass. 369.)

Yet, these two established and recognized rules accompany and weigh heavily in the consideration of every aspect of the proceeding, and its consideration as a whole. These rules accompany and, in a measure, protect the defendant throughout the consideration and determination of the case and until a final decision is reached, just as do the presumption of innocence and the doctrine as to reasonable doubt.

I.

Petitioner contended that refusal of the courts below to hold that payment of alleged experts' fees violated the two statutes in point and the statutory procedure provided thereby, resulted in denying petitioner an impartial trial and violated his constitutional rights. The Government fails to adequately or even really answer this contention.

(a) The Government states that petitioner relies on the Department of Justice Appropriation Act of 1939, Act April 27, 1938, c. 180, 52 Statute 268, which is only partly true: as petitioner relies also on § 601, Title 28, U. S. C. A. and on the cases cited by him in Subdivision (c) of Point I, p. 11, his brief, said § 601 providing that a witness should be paid $1.50 a day for each day's court attendance and the authorities hold that "an expert witness may be compelled to testify * * * without any compensation other than the fees of an ordinary witness."

(b) Next, the Government says that the Appropriation Act appropriated a sum "for * * * miscellaneous expenses * * * including experts * * *," inferring that this provision contradicts the one forbidding the use of the money appropriated for the payment of experts, which is not at all the case: experts can be paid for preparation of a case, (which

is not involved here), but were limited to the payment of $1.50 a day for testifying.

(c) The Government mistakenly assumes that said § 601 and said provision of said Appropriation Act and the numerous cases holding that "an expert witness may be compelled to testify * * * without any compensation other than the fees of an ordinary witness," may be ignored, whereas, of course, they are binding and prohibited the payments made to the alleged experts.

(d) Next, the Government claims that petitioner was bound to prove bribery and that he failed to do this. In this claim the Government ignores the judicial definition of bribery which "may be defined (as) the giving * * * to another anything of value * * * to influence him in the discharge of some legal duty," (*Dishon* v. *Smith*, 10 Iowa 212, 221), and petitioner did prove the giving to these alleged experts of $25.00 a day for testifying, to influence them in the discharge of their legal duty to testify. So, complete proof was made.

II.

Petitioner asserted that the district court erred in excluding testimony as to bias of the witness Tarr. The Government mistakenly claims that such testimony was not excluded.

(a) Petitioner alleged in his petition and asked to prove that Tarr went to the mine owners and asked for a job, and told the owners that the property was valuable, and then testified that the property was worthless. The court limited the testimony to bribery, (Tr. 8-55-56).

(b) Exclusion of this evidence was highly prejudicial and the facts were learned only shortly before the hearing in the district court. It was the District Attorney's duty to swear only unbiased witnesses. He could, and should have easily learned of Tarr's bias. His violation of his

duty resulted in petitioner being denied a fair trial. (*Commonwealth* v. *Sacco*, 255 Mass. 369; *Lisenba* v. *Calif.*, 314 U. S. 236, 237; *Martin* v. *U. S.*, 17 F. (2d) 973; *Larrison* v. *U. S.*, 24 F. (2d) 82; *Walker* v. *Johnson*, 312 U. S. 286; *Davis* v. *Ivey*, 112 So. 264.)

(c) Even a strict reading of the record does not justify the Government's contention that the petitioner did not offer to prove bias, but shows that he did make the offer, and as, and solely because, he was overruled, he felt compelled to rest his case on bribery.

In construing this part of the record, we are bound to bear in mind that petitioner conducted his own defense and "the record must be closely scrutinized to see that his rights * * * have been protected," (17 C. J. §3541).

(d) Next, the Government assumes that proof of bias is unimportant and that it was necessary to prove corruption which, as appears from the numerous cases cited hereinabove and quoted on Pages 15-16 of petitioner's brief, is not the rule, but a showing of bias and prejudice alone would be sufficient and far more so when connected with the other circumstances in this case.

III.

Petitioner next claimed that excluding evidence that the witnesses Tarr, Evans and Downing were not qualified and did not testify as experts, was error, as payment of expert fees to them violated the statutes as to fees and the established procedure, and petitioner was thereby denied a fair trial.

The Government mistakenly urges that the Judge was justified in concluding that petitioner must have known that these witnesses were experts and cites as proof of this that a juror asked to be excused because Tarr, a friend, "would be called in the nature of expert testimony on coal." In this argument the Government again overlooks the dis-

tinction of paying a witness for *preparing and for testifying*, and also overlooks the fact that Tarr swore that he was getting $25.00 a day *while at the property*, thus concealing the payment to him for testifying, (Tr. 45).

Next, the Government claims that petitioner must have known that the witnesses were experts because he moved to strike out the testimony of Evans, Downing and Tarr and others who testified as to the value. But, a motion, of course, could be made to strike out the testimony of an ordinary witness, and it does not follow at all that petitioner knew the witnesses were experts because he moved to strike out their testimony. Again, the Government claims that the inconsistent statements by Downing and Tarr, which petitioner contended would support his charge of bribery, were as to value, but a witness is not necessarily an expert because he testifies as to value.

In considering and determining the questions under this point, it must be remembered that,—

> "* * * The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record it is his right to be heard." (*Walker* v. *Johnson*, 312 U. S. 286.)

IV.

Next, petitioner contended that the destruction of the trial minutes by the government's "Official Court Reporter" has made it impossible for petitioner to show that he was denied an impartial trial. The Government contends on an incomplete statement of the facts, that there is no inference of an attempt to conceal evidence and further mistakenly contends that the destruction was not that of one whose act was binding on the Government.

(a) The Government contends that, as the minutes were destroyed several years after petitioner's appeal had been determined, no inference of an attempt to conceal evidence

can be drawn. The appeal was determined December 18, 1940 (*Walker* v. *U. S.*, 116 F. (2d) 458), and the minutes were destroyed early in 1943, so the destruction was only two years after decision of the appeal.

But, the decision of the appeal is of no importance on the question as to the purpose in destroying the stenographer's notes: the important fact is that the minutes were destroyed early in 1943 while the appeal in this proceeding was pending, which was decided November 24, 1943.

The Government, by its argument, apparently concedes that, if the destruction occurred while an appeal was pending, (and they were destroyed at such a time), this at least justifies, if it does not necessitate, an inference of an attempt to conceal evidence.

(b) The Government errs in its contention that the "Official Court Reporter" was not an officer of the United States. He was such an officer and his acts bind the United States:

1. Counsel for petitioner is advised by government counsel that the district judge appoints an "Official Reporter," who acts as such in Government cases and legal matters.

2. As appears from his letterhead, Anderson, who took the minutes on the trial herein, is known as the "Official Court Reporter", undoubtedly with the full knowledge and approval of the district judge, and *Anderson is recognized as having a government standing by being given an office in the Courthouse.*

3. Anderson, the "Official Court Reporter," must have been paid by the Government because, until after the trial, petitioner defended as a pauper.

4. As Anderson had the right to exercise a public * * * employment and to take the fees and emoluments thereunto belonging, he held an office, (2 Blackstone Com. 36; see also the very numerous definitions of a office, beginning at Page 4921 in Vol. 6 of Words and Phrases, the public

employment of Anderson being an office within many of these definitions.)

5. As the Government has asserted and permitted Anderson to assert that he is an "Official Court Reporter" it cannot now assert the contrary, (31 C. J. S. 108, p. 341); and the doctrine of equitable estoppel applies as against the Government, (Id., § 140, p. 411).

6. As the Government destroyed the minutes of trial, there arises a conclusive presumption that there should have been a verdict of "not guilty" and this cannot be rebutted by secondary evidence. (See authorities on Pages 21-23 incl., original brief.)

CONCLUSION.

As stated at the beginning of this brief, the Government, with its force of extremely able and experienced attorneys, has failed to answer any of the sufficient grounds advanced by petitioner in his original brief for his claim that he was denied a fair trial and his constitutional rights, which is not alone persuasive, but decisive proof that petitioner's grounds are valid and unassailable.

S. WALLACE DEMPSEY,
Attorney for Petitioner,
723 Investment Building,
Washington, D. C.

(12)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 724.

CLYDE H. WALKER, *Petitioner,*

v.

P. J. SQUIER, WARDEN, United States Penitentiary, McNeil Island, Washington, *Respondent.*

PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF,— PETITION DENIED MARCH 27, 1944.

S. WALLACE DEMPSEY,
Counsel for Petitioner.
Investment Building,
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 724.

CLYDE H. WALKER, *Petitioner,*

v.

P. J. SQUIER, WARDEN, United States Penitentiary, McNeil Island, Washington, *Respondent.*

(This is a Petition for Rehearing in Habeas Corpus, the Points Being First Summarized, Followed by a Statement of Facts and the Argument.)

Petitioner asks a rehearing herein because the decisions below, if condoned, will be of great and constantly recurring, nationwide, irremedial harm to the Government and to innocent persons accused of crime, who do not have the means to compete in hiring experts. They are in conflict with this Court's decisions and with State and Federal decisions generally, and the text books. The three most vital issues involved were not presented and two were inadequately presented owing to insufficient time to study the case. The grounds relied on are as follows:

1. **(New.)** The Prosecution concealed the fact **(through testimony known to them to be perjured)** that the witnesses as to value, **(guilt depending on that alone)**, were experts, which was "the failure to observe that fundamental fairness essential to the very concept of justice" (*Lisenba* v. *Calif.*, 314 U. S. 219), and entitles petitioner to a reversal of the conviction.

Accused offered to show that he did not know until after the time for appeal had expired, that these witnesses were experts, but the Judge summarily, erroneously overruled this contention,—

> "That * * * allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence" (*Walker* v. *Johnson*, 312 U. S. 275, 287).

As the Government destroyed the minutes, there is a conclusive presumption that they would prove petitioner's contention (*Taylor* v. *Riggs*, 1 Peters 591, 690, opinion by Chief Justice Marshall; 2 Wigmore (3rd Ed.) § 277, pp. 119, 120), secondary evidence not being admissible as the minutes could not be satisfactorily reproduced, (*Renner* v. *Bk. of Columbia*, 9 Wheaton 581, 597; *Taylor* v. *Riggs, supra*).

The prosecution planned this concealment: Tarr, who was paid $25.00 a day for 8 days in Court, testified (Tr. 6) that he was paid $25.00 per day **while at the property** (Tr. 8), whereas he was not there before this, but only during the former trial and was paid for testifying and only for testifying at this trial (Tr. 6), thus successfully concealing that he was testifying as an expert.

It was the duty of the prosecuting officer not to allow this perjured testimony to stand, and his doing so was—

> "* * * a deliberate deception of Court and jury by the presentation of testimony known to be perjured. * * * as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation" (*Mooney* v. *Holohan*, 294 U. S. 103, 112; See also *Lisenba* v. *Calif.*, 314 U. S. 219, 237 and *Martin* v. *U. S.*, 17 F. (2d) 973).

Moreover,—

> "* * * it is the duty of the District Attorney to select able and unprejudiced experts who would testify without partiality or bias against the defendant * * *." (*Commonwealth* v. *Sacco*, 255 Mass. 369; 23 C. J. S. § 1081, p. 519);

and certainly Tarr, by this perjured answer, proved that he was strongly biased and he should have been withdrawn as a witness.

Concealing the expert character of these witnesses was extremely material and the prosecution "* * * contrived a conviction through * * * a deliberate deception of court and jury * * *" (*Mooney* v. *Holohan, supra*). Because of this deception and perjured testimony **the conviction should be set aside,** for, if it had been known, defendant would have had the right in his argument to advise the jury that they were,—

> "* * * not bound by the opinion of an expert witness" (2 Wharton Crim. Ev., 11th Ed., § 1025, p. 1792), and
>
> "* * * expert testimony should be submitted to the jury by the Court under the proper cautionary instructions, * * *" (Id., p. 1793) and,
>
> "* * * and the action of prosecuting officers in behalf of the State, * * *, may constitute State action within the purview of the Fourteenth Amendment" (*Mooney* v. *Holohan, supra*).

2. **(New) The District Court violated the Statute by refusing to receive evidence of the concealment of the character of the witnesses as experts,—a vital issue, as has been shown.**

The Court summarily refused to receive this evidence as unbelievable, in conflict with *Walker* v. *Johnson, supra,* holding,—

> "The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him the opportunity to support them by evidence."

The denial of the right to receive this evidence was far greater error than that committed in *Walker* v. *Johnson, supra;* there, the Court erred by basing its decision on affidavits instead of taking testimony, while here, **any** hearing on this very vital matter was denied. **The Statute entitled petitioner to a hearing and the Judge had no right to determine this vital question summarily and without a hearing** (*Waley* v. *Johnston*, 316 U. S. 101.)

3. **Expert witnesses were paid large sums, violating § 601, Title 28, U. S. C. A., the 1939 Dept. of Justice Apprtn. Act, passed April 27, 1938, and the bribery statute, § 240, Title 18, Crim. Code, by which Congress provided an effective method to prevent bringing unjustifiable prosecutions based on purchased expert testimony, thus protecting the taxpayer and accused persons, which fails if the decisions below stand. Instead, the 184 prosecuting officers will employ experts when and at what prices, they please.**

The language of these three Statutes is plain, with no room for construction. The law is double-locked: § 601 fixes the fees and the Appropriation Act prohibits paying more, and these two Acts fit into the bribery statute as a complete plan of double protection to the taxpayer and the accused.

The Circuit Court of Appeals held that violating the three Statutes was not denial of a fair trial or due process, but this Court holds that violation of statutory procedure is reversible error (*Walker* v. *Johnson*, 312 U. S. 275; *McNabb* v. *U. S.*, 318 U. S. 332; *Chambers* v. *Florida*, 309 U. S. 227); and *Henkel* v. *C. M. St. P. & P. Ry. Co.*, 284 U. S. 444, holds that the federal statutes prohibit, in all cases, payment of expert fees.

4. **The "Official Court Reporter," pending the hearing in the Circuit Court of Appeals, destroyed the minutes. The Government is responsible for this fraudulent act, and it gives rise to a conclusive presumption that petitioner should have been acquitted.**

(a) The Government is responsible for the spoliation: the destruction was by the "Official Court Reporter," appointed as such by the District Judge, whose letterhead proclaimed him such official, who was given an office in the courthouse and must have been paid by the Government, since petitioner defended as a pauper; he had the right to exercise a public employment and to take the emoluments, which is holding an office (2 Blackstone Com. 36); **the Government** permitted him to assert that he was, and **held him out as, an official** and cannot assert the contrary (*Whiteside* v. *U. S.*, 93 U. S. 247; 31 C. J. S. 108, p. 341); the Government entrusted him with the custody of the minutes and it must stand the consequences (19 Am. Jur. p. 335, § 483 and p. 695, § 67); and it is responsible for his lack of judgment or discretion (35 Id. 975, § 544).

(b) As the destruction was pending hearing the appeal, the inference is that it was fraudulent (11 Cyc. of Ev. 956).

(c) Secondary evidence of the minutes cannot be received both because they were destroyed by design, and no satisfactory proof of their contents can be made. (*Renner* v. *Bk. of Columbia, supra; Taylor* v. *Riggs, supra.*)

The rule is that all presumptions are drawn against poliators. Here, the issues were whether petitioner was lenied due process and whether he was guilty, and preumptions arise that he was denied due process and was nnocent, and, as secondary proof to the contrary cannot e made, this presumption is conclusive (*Taylor* v. *Riggs, upra;* 2, *Wigmore on Ev.* (3rd Ed.), § 277, pp. 119, 120).

Facts Alleged in the Petition.

The Statutes involved are:

1. Section 601, Title 28, U. S. C. A. which was in force until December 24, 1942 and when the trial took place between October 1938 and February 1939, and provided that, "witnesses shall be paid for each day's attendance in court * * * $1.50 * * *."

2. The Department of Justice Appropriation Act of 1939, passed April 27, 1938, providing, " * * * that no part of the sum herein appropriated shall be used to pay any witness more than one attendance fee for any one calendar day, which fee shall not exceed $1.50."

The essential part of the definition of bribery in the Federal Statutes is as follows:

> "Whoever, being, or about to be, a witness upon a trial * * * before any court * * *, shall receive, * * * a bribe, upon any agreement or understanding that his testimony shall be influenced thereby, * * * or because of such testimony, * * * shall be fined not more than $2,000, or imprisoned not more than two years, or both." (U. S. C. A. Title 18, § 240, Criminal Code.)

Petitioner alleges—

1. That witnesses were paid for testifying,—Raymond P. Tarr, $200 for 8 days (Tr. 6), but testified that he was paid $25.00 per day **while at the property** (Tr. 7); Thos. F. Downing, Jr., $250 for 10 days; and Geo. E. Evans $50.00 for 2 days (Tr. 6).

2. That Tarr had tried to get employment with the United Collieries Company after the indictment and prior to the trial herein, and not succeeding and for a consideration, he testified falsely (Tr. 8-9).

3. That the purpose of paying these witnesses was to influence them to falsely testify that coal does not exist in commercial quantities in the property of

United Collieries Company at Glacier, Washington (Tr. 9).

4. That petitioner did not learn of the illegal payments to Downing, Tarr and Evans until August 20, 1942,—long after the time to appeal had expired (Tr. 6, 7, 9-10).

5. That petitioner reasserts his denial of guilt (Tr. 13).

6. Respondent's answer admitted that various persons, including Raymond Tarr, were paid as expert witnesses, and made a general denial of other allegations.

The Court ruled,—

That the government has no power to compel an expert to express an opinion; that such payment did not mean that corruption and bribery exists; that payment did not violate the law or a constitutional right (Tr. 42-46); but it would not bar evidence that the witnesses were bribed and thus swore falsely (Tr. 53); but that bribery, unless petitioner had direct evidence, should have been and he believed was covered when the witnesses testified; and he ruled against petitioner (Tr. 57).

Petitioner stated that he did not know the witnesses were experts, that they were not so qualified, and that nothing was said in this respect except that Tarr falsely testified that he was getting $25.00 a day **while at the property.** The court ruled that petitioner must have known (Tr. 43-46).

Petitioner stated that he learned eight weeks before the hearing that Downing made a report in 1917 the opposite of his trial testimony; the court ruled that expert witnesses were free to change their minds and it would not indulge in any presumption that the $250.00 paid Downing changed his mind, but would not foreclose any admission by Downing (Tr. 54-55).

Petitioner asked whether the court would consider evidence that Tarr, in 1937, asked the United Collieries for a job and told them that the property involved here was valuable. The court asked whether petitioner cross-examined Tarr and petitioner replied that he did not know the facts until after his conviction; the court reiterated that only direct evidence of bribery would be received (Tr. 57). **The court directed that a transcript be furnished because he was unable to find a case challenging the payment of expert fees** (Tr. 60).

Petitioner filed objections and suggestions to the proposed findings of fact and conclusions of law. The court found that the payment of $25.00 a day to experts did not constitute bribery or affect jurisdiction (Tr. 31).

ARGUMENT.

I.

The Prosecution concealed the fact (through testimony known to them to be perjured), that the witnesses as to value (guilt depending on that alone), were experts, which was "the failure to observe that fundamental fairness essential to the very concept of Justice" (Lisenba v. Calif., 314 U. S. 219), and entitles petitioner to a reversal of the conviction.

(a) NEW. The facts show conclusively that the **prosecution deliberately planned to conceal the character of the value witnesses as experts, and succeeded in this plot.** The proof is as follows:

1. These witnesses had visited the mine and so could testify to facts from observation, and so could mislead and did deceive petitioner into the belief that they were not testifying as experts.

2. Tarr swore that he was being paid as an expert **for the time spent at the mine**, which was false and perjured in that he had not been at the mine previous

to this, the second trial, but only during the first trial, and he was paid on this trial for 8 days **attendance to testify, and only for that.**

3. The prosecuting attorney was present at the hearing and vigorously opposed the granting of the writ and when petitioner claimed that he did not know that the value witnesses were experts until after the time to appeal had expired, he could have easily disproved this claim (if it had been contrary to the fact), by asserting that the petitioner in his final address told the jury that they were not obliged to receive the opinion of the experts, and that the trial judge, as it was his duty to do and as beyond question he would have done if the value witnesses had appeared to be experts, charged the jury that the opinions of the experts must be received with caution. Failure of the prosecuting attorney to state this is conclusive proof that petitioner did not make this statement to the jury and that the Judge did not so instruct them, and that petitioner was thus deprived of these two highly valuable items of his defense.

That the facts were not proved in more detail was due to the erroneous ruling of the trial Judge in summarily refusing to receive proof because he thought it "improbable and unbelievable." (*Walker* v. *Johnson*, 312 U.S. 275, 287.)

(b) **The successful working out by the prosecution of this scheme to conceal the expert character of the witnesses, involved the omission by the prosecuting attorney of a plain duty**: he knew that Tarr's answer was perjured and **he should have promptly disclosed this to the Court and the jury,—**

> "* * * a deliberate deception of Court and jury by the presentation of testimony known to be perjured," is "* * * as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by

intimidation." (*Mooney* v. *Holohan*, 294 U. S. 103, 112; See also *Lisenba* v. *Calif.*, 314 U. S. 219, 237 and *Martin* v. *U. S.*, 17 F. (2d) 973.)

"He" (a District Attorney), "may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*Berger* v. *U. S.*, 295 U. S. 86, 88, 79 L. Ed. 1321.)

Moreover,—

"* * * it is the duty of the District Attorney to select able and unprejudiced experts who would testify without partiality or bias against the defendants * * *." (*Commonwealth* v. *Sacco*, 255 Mass. 369; 23 C. J. S. § 1081, p. 519.)

and certainly **Tarr, by this perjured answer, proved that he was strongly biased** and he should have been withdrawn as a witness. Concealing the expert character of these witnesses was extremely material and the prosecution "* * * **contrived a conviction through * * * a deliberate deception of court and jury * * *"** (*Mooney* v. *Holohan, supra*), **which should be set aside**, for, if it had been known, defendant would have had the right in his argument to advise the jury that they were,—

"* * * not bound by the opinion of an expert witness" (2 Wharton Crim. Ev., 11th Ed., § 1025, p. 1792), and

"* * * expert testimony should be submitted to the jury by the Court under the proper cautionary instructions, * * *." (Id., p. 1793.)

"* * * the evidence of experts is of the very lowest order and of the most unsatisfactory character." (Jones on Evidence, § 1371, p. 2510.)

"* * * and the conclusion of the court below rested upon that most unsatisfactory evidence, the testimony

of expert witnesses employed by the parties." Knoxville v. Knoxville Water Co., 212 U. S. 1 at 18.

"Skilled witnesses come with such prejudice on their minds that hardly any weight should be given to their evidence. Appleton Waterworks Co. v. R. R. Commission, 154 Wis. 121 at 154, 142 N. W. 476, 47 L. R. A. (N. S.) 770, Ann. Cas. 1915B, 1160."

The last two quotations are taken from Note 13, Page 429 of *McCart* v. *Indianapolis Water Co.*, 302 U. S. 419.

The rule as to the unreliability, the inherent weakness of expert testimony is peculiarly applicable here because,

1. The question was the productive value of a mine and, in a similar case, this Court stated,—

   "In the first place, the intrinsic value of the leases is dependent upon the capacity of the lands to yield productive wells, a capacity seldom to be judged with even a fair approach to certainty until tested by experience." (*Dayton P. & L. Co.* v. *Public Utilities Commission*, 292 U. S. 290, 299.)

2. The bias of the witness Tarr was shown by his perjured answer to the question as to whether he was an expert witness, as to which this Court said in the same case at page 299,

   "To these perturbing tendencies, all operating to weaken the persuasive force of their (expert) opinions, there must be added still another, that of interest or bias, conscious or unconscious,"—here not alone conscious but expressed through perjured testimony.

(c) As the Government destroyed the minutes and they could not be satisfactorily reproduced, and secondary evidence is not therefore admissible (*Renner* v. *Bk. of Columbia, supra; Taylor* v. *Riggs, supra*), there is a conclusive presumption that they would prove both that petitioner did not have a fair and impartial trial and was **denied due process**, and that he should have been acquitted.

We quote from an opinion by Chief Justice Marshall,—

> "When a written contract is to be proved, not by itself, but by parol testimony, no vague, uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself. The substance of the agreement ought to be proved satisfactorily; and if that cannot be done, the party is in the condition of every other suitor in court who makes a claim which he cannot support. When parties reduce their contract to writing, the obligations and rights of each are described, and limited by the instrument itself. The safety which is expected from them would be much impaired, if they could be established upon uncertain and vague impressions made by a conversation antecedent to the reduction of the agreement." (Taylor v. Riggs, 1 Peters 591, 600.)

See also *Renner* v. *Bk. of Columbia*, 9 Wheaton 581, 597.

(d) The conviction also should be reversed because it was obtained by the perjured testimony of Tarr,—

> "It" (**due process**) "is a requirement that cannot be deemed to be satisfied by mere notice and hearing, if a State has contrived a conviction through the pretence of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." (*Mooney* v. *Holohan*, 294 U. S. 103, 112.)
>
> "* * * in Martin v. United States, 17 F. (2d) 973, * * * the court said: 'There is no way for a court to determine that the perjured testimony did not have controlling weight with the jury,' * * *."

(e) The way the **witnesses** earned the payment of these illegal fees is illustrated by the perjured testimony of Tarr. The payment to these witnesses of expert fees was,—

> "* * * the giving * * * to another anything of value, * * * intended to influence him in the discharge of some legal duty." (*Dishon* v. *Smith*, 10 Iowa 212);

the public duty of testifying on payment of the ordinary statutory fee. (See also *People* v. *Peters*, 265 Ill. 122.)

Bribery has been found, where it depended on influencing testimony and was expressly denied,—where the proof was much less clear than it is here. We quote 2 cases,—

In *Wilson* v. *U. S.*, 77 F. (2d) 236 (Cert. denied 295 U. S. 759), defendants, who had been prohibition officers and had participated in raids on illicit manufacturers of liquor, offered to have proceedings against violators against whom they had evidence, quashed for a cash consideration, which was paid defendants by the violators. Defendants were indicted for accepting money upon an agreement that their testimony would be influenced thereby in violation of said § 240. The court held—

> "So far as the evidence shows, the defendants had nothing to sell except the suppression of Wilson's evidence, and, although the purchasers testified that no agreement to the effect that Wilson's testimony against them was to be influenced by their payments, was actually expressed, we think that the jury were justified in inferring that bribes were accepted for that reason and upon that understanding, since the testimony is inconsistent with any other reasonable hypothesis."

Again, in *State* v. *Ventola*, 122 Conn. 635, 110 A. L. R. 578, it was held,

> "In the exercise of reason, the trial court could hardly have concluded otherwise than that the offer of payment of $200. to Riolino, a relief worker, for testimony before a referee, and $100. additional for testimony in court, was intended to influence the testimony. There is no basis in the record for an inference that such offer could have been made to cover any legitimate or reasonable expense of the prospective witness in attending the trial or for any proper or legitimate purpose.

> The conclusion is inescapable that the offer was made to influence Riolino to testify less favorably to Pouzzner than he otherwise would have done."

II.

NEW. The District Court violated the statute by refusing to receive evidence of the concealment of the character of the witnesses as experts,—a vital issue, as has been shown.

The Court summarily refused to receive this evidence as unbelievable, in conflict with *Walker* v. *Johnson, supra,* holding,—

> "The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him the oportunity to support them by evidence."

The denial of the right to receive this evidence was far greater error than that committed in *Walker* v. *Johnson, supra:* there, the Court erred by basing its decision on affidavits instead of taking testimony, while here, any hearing on this very vital matter was denied. The Statute entitled petitioner to a hearing and the Judge had no right to determine this vital question summarily and without a hearing.

III.

Expert witnesses were paid large sums, violating § 601, the 1939 Dept. of Justice Appropriation Act and the bribery statute, § 240, providing an effective method to prevent unjustifiable prosecutions based on purchased expert testimony, thus protecting the taxpayer and accused person, which fails if the decision below stands, in which case the 187 prosecuting officers will employ experts when and at what prices they please.

The original brief, after quoting § 601 and the Appropriation Act, urged that,—

(a) An expert may be compelled to testify for the fee of an ordinary witness, citing authorities;

(b) That violation of the 2 Statutes was a violation of procedure, depriving petitioner of his constitutional rights, and requiring reversal of the conviction, citing *Walker* v. *Johnson, supra; Miller* v. *U. S.*, 120 F. (2d) 968, 969, 973; *Weiss* v. *U. S.*, 308 U. S. 321.

(c) That the courts below mistakenly held that the contention that excess payments were bribery depended on an inference only, whereas payments were made to influence the witnesses in the discharge of their legal duty to testify, which is bribery, it having a tendency to pervert justice, citing *Peo.* v. *Peters, supra; Harrison* v. *State*, S. W. 552; *Dishon* v. *Smith, supra; Peo* v. *VanDeCarr*, 84 N. Y. S. 461; *Commonwealth* v. *Bell*, 145 Pa. 374.

(d) That petitioner did not know that the witnesses were experts; they were not qualified as such, and nothing was said in court to that effect; Tarr was asked what he was and answered that he was getting $25 a day **while at the property**, whereas he was paid $25 for 8 days court attendance (Tr. 6), although he testified only 2 days (Tr. 7-45). Moreover, he went to the mine but once and that during the first trial, and he was paid for 5 days there and **only for testifying at this, the second trial.** So, his answer was contrary to the fact and clearly intended to be so, both in the circumstance that he was not paid at the second trial for being at the property, and that he was paid for testifying and only for testifying. Downing testified for one day and was paid for 10 days as an expert witness,—$250 (Tr. 6); Evans testified one day and was paid for 2 days (Tr. 6-27).

It is now urged that,—

(a) § 601 and the Appropriation Act are both clear and need no construction, and that *Henkel* v. *C. M. St. P. & P. Ry. Co.*, 284 U. S. 444, lays down a broad and general rule that the federal statutes do not permit payment of more

than the ordinary fee to experts and the decision is **not limited** to taxation of a bill of costs. We quote from the opinion by Chief Justice Hughes:—

> "But this provision, by its terms, is inapplicable, as the Congress has definitely prescribed its own requirement with respect to the fees of witnesses. The Congress has dealt with the subject comprehensively and has made no exception of the fees of expert witnesses. Its legislation must be deemed controlling and excludes the application in the Federal courts of any different State practice."

(b) **The use of evidence improperly obtained, as it was used here, is a denial of due process, requiring a reversal. We quote from** *McNabb* v. *U. S.*, 318 U. S. 332.

In the McNabb case, quoted below, the grounds of reversal were that it was questionable whether confessions were voluntary and that the arresting officers failed to take the accused promptly before a committing magistrate, as the State requires.

The Court condemns the violation of the Statute in the eloquent and forceful language as follows:

> "Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law."
>
> "The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of procedures imposed by law." (pp. 346, 347.)

See also *Chambers* v. *Florida*, 309 U. S. 227.

(c) Payment of the excess amounts was unnecessary because expert witnesses can be compelled to testify for the fees of ordinary witnesses, as is held by the following authorities in addition to those heretofore cited, viz,—8 Wigmore on Evidence §2203, p. 134; 2 Wharton's Crim. Evidence, 11th Ed., § 1025, pp. 1793, 1794.

IV.

The "Official Court Reporter," pending the hearing in the Circuit Court of Appeals, destroyed the minutes. The Government is responsible for this fraudulent act, and it gives rise to a conclusive presumption that petitioner should have been acquitted.

The various grounds on which the Government should be held responsible for the destruction of the minutes by the "Official Court Reporter" are stated in the Summary under Point 5 and need not be repeated here. Briefly stated, the Government appointed this man, acquiesced in his holding himself out as an official, gave him a courthouse office, and entrusted the papers to him as its official. The Judge and prosecuting attorney knew that the minutes should be preserved until petitioner had served out his sentence, **to enable him to prove on habeas corpus that he had not had a fair or impartial trial, but had been denied due process,** yet **they** left the minutes in the hands of this "Official Court Reporter" and thus afforded him the opportunity to do it, and he destroyed them at the opportune time for the Government, when the appeal to the Circuit Court of Appeals was pending.

Under such circumstances, the petitioner should not be forced to suffer from this wrongful spoliation.

Because of its holding this man out in these various ways as an "Official Court Reporter" (and much more, taking all the circumstances into consideration), **the Government is liable for this spoliation.**

> "* * * but the government or public authority is not bound in such a case" (where the act was done by the agent in the course of his regular employment), "unless it manifestly appears that the agent was acting within the scope of his authority, or that he had been held out as having authority to do the act, or was employed in his capacity as a public agent to do the act or make the declaration for the government." (*Martin* v. *Hazard Powder Co.*, 93 U. S. 247, 258.)

"* * * the United States may waive a claim and be estopped from the assertion of a claim under circumstances that would estop an individual from the assertion of a similar claim." (*U. S.* v. *Denver etc. Co.*, 16 F. (2d) 374, 376.)

CONCLUSION.

The prosecution "contrived a conviction through,—

1. a deliberate deception of court and jury" (*Mooney* v. *Holohan, supra*), by concealing the fact that the only material witnesses were experts "upon the capacity of the lands," (here, a mine), "to yield productive wells," (here, commercial quantities of coal), "a capacity seldom to be judged with even a fair approach of certainty until tested by experience," (*Dayton* * *Co.* v. *Pub.* * * *Com., supra*), and petitioner, through this concealment was denied the invaluable right to have the Court charge the weakness of this testimony;

2. "the presentation of testimony known to be perjured," (*Mooney* v. *Holohan, supra*), that of Tarr; and

3. the failure of the prosecuting attorney to perform his duty by advising the court and the jury that this testimony was perjured, (*Berger* v. *U. S., supra*), and to select unprejudiced experts (*Commonwealth* v. *Sacco, supra*), and to withdraw Tarr as a perjured and biased witness from the stand, (*Berger* v. *U. S., supra*).

"Such a contrivance * * to procure the conviction * * of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result from intimidation," (*Mooney* v. *Holohan, supra*).

Besides this contrivance, **expert witnesses were paid 16 times the fees permitted by the three statutes, violating them and nullifying the comprehensive plan of Congress to protect the Treasury and the taxpayer and the poor man defending, as here, as a pauper, from conviction through purchased testimony,**—not alone violating statutory pro-

cedure and requiring reversal, (*Walker* v. *Johnson, supra; Miller* v. *U. S., supra; Weiss* v. *U. S., supra; Henkel* v. *C. M. St. P. & P. Ry. Co., supra; Dishon* v. *Smith, supra*), but unnecessarily, since these experts could have been compelled to testify for the ordinary fees, (*8 Wigmore on Ev.*, § 2203, p. 134; *2 Wharton Crim. Ev.* (11th Ed.), § 1025, p. 1793).

And the Government endeavored to make this conviction by contrivance and through bribery and perjured testimony stand, through fraudulent destruction of the minutes, at just the time when it was expected they would be needed, and, as they cannot be satisfactorily reproduced, "the party" (spoliator), "is in the condition of every other suitor in court who makes a claim which he cannot support," (*Taylor* v. *Riggs, supra*),—here the contention is that the conviction should stand, whereas it should be set aside, and **habeas corpus** is the **only means** to preserve petitioner's constitutional rights (*Waley* v. *Johnston*, 316 U. S., 101, 104, 105).

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the Circuit Court of Appeals for the Ninth Circuit be, upon further consideration, reversed.

Respectfully submitted,

S. WALLACE DEMPSEY,
Counsel for Petitioner.
723 Investment Building,
Washington, D. C.

I, **S. Wallace Dempsey**, counsel for the above-named CLYDE H. WALKER, petitioner, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

S. WALLACE DEMPSEY,
Counsel for Petitioner.

(13)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 724

CLYDE H. WALKER, *Petitioner*,

v.

P. J. SQUIER, WARDEN, UNITED STATES PENITENTIARY, McNeil Island, Washington, *Respondent*.

PETITION ON MOTION BY CLYDE H. WALKER IN HIS OWN BEHALF FOR LEAVE TO PRESENT A PETITION FOR A WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION BY COUNSEL DENIED MARCH 27, 1944.

REHEARING DENIED MAY 8, 1944.

CLYDE H. WALKER, *Pro Se.*,
McNeil Island Penitentiary,
P.M.B. 15124,
Steilacoom, Washington.

ALLSTRUM PRINTING CO. TACOMA, WASH.

FOREWORD

That Justice Black was a member of Senate Investigating Committee in 1935 that obtained contra to Section 605 of Communications Act telegraphic messages sent by and to petitioner from transmitting agencies, viz.: Western Union and Radio Corporation of America, copies of said messages being given against legal sanction (some of which telegrams were copied in the indictment but were refused admission as evidence by the trial court) to the Postal Inspector and United States District Attorney by the Committee to aid in the gaining of information for prosecution of petitioner-defendant, and Justice Black should not sit in judgment on this cause.

That Justices Jackson and Murphy were each Attorney Generals of United States at a time from April 1936 to January 1941 when the criminal cause was being defended and on appeal, and for such reason they each should not sit on this cause.

WESTERN UNION

Tacoma, Washington, May 14, 1944

S. Wallace Dempsey,
Attorney,
723 Investment Building,
Washington, D. C.

Your contract of employment has been fulfilled and Mr. Walker is desirous of filing a motion in Supreme Court at Washington, D. C. on his own behalf and kindly asks you to notify the Court of your withdrawal from the case.

Clyde H. Walker
By Dorothy Shallow
Tacoma Hotel,
Tacoma, Washington.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 724

CLYDE H. WALKER, *Petitioner*,

v.

P. J. SQUIER, WARDEN, UNITED STATES PENITENTIARY, McNeil Island, Washington, *Respondent*.

(This is a petition in my own behalf, to have leave of the Court, that I may file a petition and brief in support for a Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit.)

Your petitioner, Clyde H. Walker, for himself hereby asks leave of this Court to grant permission to me to be allowed to prepare and file for consideration by this Court a petition and brief in support in said Cause No. 724, October Term, 1943, for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

The reason this request is made is that I appeared as my own counsel and the only counsel for defense in two lengthy original criminal trials, and for myself in the hearing on present petition in the United States District Court, while during all of such proceedings I was a pauper.

That pending appeal of this Habeas Corpus action to Ninth Circuit Court of Appeals I became possessed of funds sufficient to pay costs, printing, and to employ counsel.

That I deferred my right to apply for parole to prosecute petition for Habeas Corpus, as I felt that my conviction was illegally obtained as two trials were necessary—the first jury not able to agree and the second jury deliberated twenty-nine hours before agreeing to guilty verdict, which evidences the fact that the case was close and not one without some question of guilt, and that possible undue advantage and illegal procedure on part of prosecution was a decisive contributing factor to gaining a conviction.

That in all respect to my Counsel, I am of the opinion that the whole and complete simple theory of my cause has not been presented to this Court and I quote from petition for rehearing by my Counsel:

> "The three most vital issues involved were not presented and two were inadequately presented owing to insufficient time to study the case."

The real issue, and in reality it is not so complicated, has not been as yet presented. I have a complete and adequate cause for relief, with controlling decisions of this Court firmly establishing my every contention, that I ask to present, with convincing reasons why I should be granted relief by Habeas Corpus, which issue for some reason, unknown to me, has not been presented, although backed in the record, and I am simply asking that the privilege, be granted to allow me in the end, of securing a just hearing on present record to prepare and file on and for my own self a petition to be considered by this Court.

ISSUE INVOLVED

The issue involved is: Does the violation of a procedural statute in a criminal proceeding of the United States District Court, which prejudices the accused, exceed the due process clause of the V Amendment to the Constitution, so as to give one so illegally convicted, without knowledge of the statute violation until over three years after conviction, a right to relief upon gaining the true facts of violation, which if such knowledge could have been had at trial and brought to the attention of the court during trial a certain mis-trial would have been granted to accused, or if in time to appeal a new trial for the error would have been ordered by Appellate Court or this Court. Now I am certain I have a right of remedy for the wrong, and the remedy is two-fold—as by the common law practice of a writ of error coram nobis—now consummated in a motion, or by a writ of habeas corpus, the latter of which I am proceeding on this appeal.

BASIC PRINCIPLES

The following basic principles which my petition and brief, if you grant, will contain:

(1) That an appellant and appellee on appeal must stick to the record as certified by the District Court, and not try to expand or add material and facts not presented in Trial Court.

(2) That all power to United States Courts in trial of crimes are gained by the Constitution and Statutes passed by Congress, and no crimes in United States Courts can be punished or tried as common law, simply meaning, All Crimes and Criminal Procedure in United States Courts are Statutory.

(3) That judges, lawyers, jurors, witnesses and all United States Government officers are to be governed by the same rules and laws as one in court accused of a crime and no partiality is to be shown to either prosecution or defense.

(4) That in a criminal trial before the bar seeking justice a poor man should be on the same basis of equality in proceedings as the rich man, and all laws should apply with equal specification to the poor as to the rich and to the accused as to the prosecution.

(5) That the burden of proof in a habeas corpus proceeding is on the petitioner to show he is being illegally detained, to have the Writ issue to give him freedom.

If the above five (5) principles are sound, and I affirm they are, and will present citations of this Court if granted permission, to back my theory, and in order to have justice, I appeal to fairness that you grant me an opportunity to speak for myself in petition and brief.

That as I am incarcerated in McNeil Island Penitentiary, and necessarily certain rules and regulations slow the mechanics of getting statutes, copies of court decisions, preparation and printing of a presentation to your Honors, and whereas, if granted a hearing could not be had until next October term, 1944, I, therefore, ask that I be given until September 1st, 1944, or as near thereto as permissible, to file my petition for certiorari in my own behalf. It will be concise, not lengthy, to the point, polite but fearless, within the record, and a United States Supreme Court decision for every presentment.

CLYDE H. WALKER,
Pro Se.

I, Clyde H. Walker, for myself do hereby certify that the foregoing petition is presented in the very utmost sincerity and good faith, backed by legal practice since 1910 on part of petitioner, and that it is not for delay but an asking to be allowed to speak for myself in a most serious situation, that my legal theory of my case may be presented.

CLYDE H. WALKER,
Pro Se.

May 1944. I certify that three copies of this presentment have been placed in the United States Post Office at Tacoma, Washington, with correct postage stamps thereon, and addressed to Honorable Charles Fahy, Solicitor General, Department of Justice Building, Washington, D. C. (air mail)

CLYDE H. WALKER.